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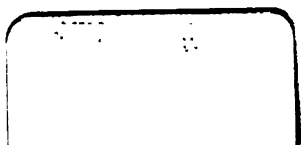
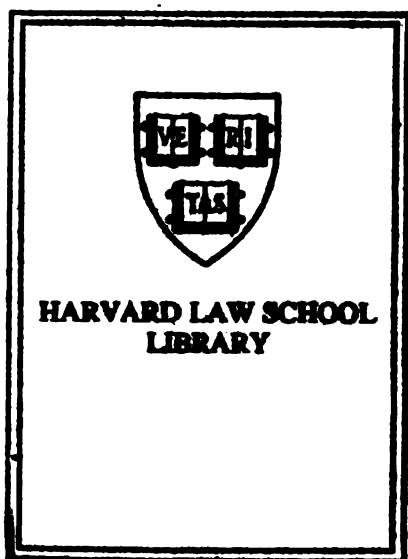
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MINNESOTA REPORTS

VOL. 75

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT

OF MINNESOTA

DECEMBER 16, 1898—FEBRUARY 21, 1899

HENRY BURLEIGH WENZELL

REPORTER

ST. PAUL
FRANK P. DUFRESNE
1900

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SECRETARY OF THE STATE OF MINNESOTA, IN TRUST FOR THE BENEFIT OF THE
PEOPLE OF SAID STATE

Rec. May 2, 1900.

JUSTICES
OF THE
SUPREME COURT
OF MINNESOTA

DURING THE TIME OF THESE REPORTS

HON. CHARLES M. START, CHIEF JUSTICE.
HON. WILLIAM MITCHELL.
HON. LOREN W. COLLINS.
HON. DANIEL BUCK.
HON. THOMAS CANTY.

DARIUS F. REESE, Esq., Clerk.

ATTORNEY GENERAL,
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HON. WILLIAM B. DOUGLAS.²

¹ His term of office expired January 2, 1899.

² Elected November, 1898.

NOTE.

By Laws 1895, c. 23, the reporter is required to report all cases argued and determined in the court.

By the practice of the court, based on G. S. 1894, § 4826, the headnote in each case is prepared by the judge writing the opinion.

The cases are reported in the order of their decision. The date of the decision follows the title of each case. The numbers given below the date indicate the number of the case in the files of the clerk of court and the number of the case in the general term calendar, the calendar numbers being enclosed in (). The cases in this volume are from the October, 1898, term calendar, unless otherwise noted.

As required by Laws 1895, c. 23, the names of counsel are followed by their official designation, as subscribed by them to their respective briefs.

In citations from the first twenty volumes of the Minnesota reports the page of the original edition is given, preceded by the corresponding page of the edition prepared by Chief Justice Gilfillan.

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CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF MINNESOTA.

SYLVESTER KIPP and Another v. JAMES ROBINSON.

December 16, 1898.

Nos. 11,398¹—(174).²

Notice of Redemption from Tax Sale under Laws 1893, c. 150—State v. Nord Followed.

A notice of the expiration of the time of redemption from a tax sale, which fixes the time at 90 days, instead of 60, as prescribed by statute, is insufficient. *State v. Nord*, 73 Minn. 1, followed.

Action in the district court for Chisago county to determine adverse claims to real estate under tax sales. Defendant claimed title by virtue of a tax certificate dated October 12, 1893, under Laws 1893, c. 150. The cause was tried before Crosby, J., who ordered judgment for defendant. From the judgment entered in accordance with such order, plaintiffs appealed. Reversed.

S. & O. Kipp, for appellants.

P. H. Stolberg, for respondent.

PER CURIAM.

This action was brought under G. S. 1894, § 5821, to test the tax title under which the defendant claimed. The notice of the expiration of redemption given by the county auditor stated that the time for redemption from the tax sale would expire 90 days after service of the notice and proof thereof had been filed in his office. The case is controlled by *State v. Nord*, 73 Minn. 1, 75 N. W. 760.

Judgment reversed.

¹See note on page iv, *supra*.

²October, 1898, term.

HELEN PENSTOCK and Another v. MARION S. WENTWORTH and Others.

December 16, 1898.

Nos. 11,410—(137).

Descent of Homestead—G. S. 1894, § 4470—Surviving Spouse.

The clause "free from any testamentary devise or other disposition to which the surviving husband or wife shall not have assented in writing," as used in G. S. 1894, § 4470, relating to the descent of homesteads, refers only to cases where the testator leaves a surviving spouse at the time of his or her death. It has no application to a case where a spouse was living at the time the will was executed, but died before the decease of the testator.

Helen Penstock and Ida Beard, daughters of Cyrus D. Hewitt, deceased, petitioned the probate court for Dodge county to except from the provisions of his will the 80-acre homestead which belonged to their father, and to apportion the homestead among all of his five children, share and share alike. The provisions of the will are given in the opinion. The petition was denied, Severt Olson, J. From the final decree of the probate court assigning the residue of the estate to Marion S. Wentworth, Loma Kidder and Charles C. Hewitt, their sisters and brother, the petitioners appealed to the district court of that county. In the latter court the matter was heard by Buckham, J., who affirmed the final decree of the probate court. From the judgment of the district court pursuant to such order, the petitioners appealed. Affirmed.

Littleton & McCaughey, for appellants.

Samuel Lord, for respondents.

MITCHELL, J.

On January 8, 1897, Cyrus D. Hewitt died testate and seised of 80 acres of land, which at the time of his death was, and for many years had been, his homestead, as defined by the statute relating to homestead exemptions. He left five children surviving him. His will, which had been executed April 5, 1887, was duly admitted to probate. In and by it he willed all his real and personal estate

to his wife for life, in case she survived him, with remainder to three of his children, but further directed and willed that, in case his wife died before he did, all of his property, real and personal, should go, share and share alike, to the three children thereinbefore mentioned. His wife was living when the will was made, but she died before the testator. In her lifetime she never consented in writing to the will or to the disposition of the property therein made.

When the time arrived for the probate court to assign the property to those entitled to it, the two children not provided for in the will claimed that, under the provisions of G. S. 1894, § 4470, relating to the descent of homesteads, the land should be assigned to the five children, share and share alike, for the reason that the wife of the testator had never assented in writing to the disposition of it made in the will. The probate court overruled the claim, and made a decree assigning it to the three children named in the will. From the decree, the other two children appealed to the district court. In that court both parties stipulated that the district court had complete jurisdiction of the cause, and proceeded without objection to try the case on its merits. The district court rendered judgment affirming the decree of the probate court, and from that judgment the two children appealed to this court.

The respondents move to dismiss this appeal on the ground that, under *State v. Willrich*, 72 Minn. 165, 75 N. W. 123, a decree of the probate court assigning the real estate of a decedent is not appealable, and therefore the district court never acquired jurisdiction of the action. The judgment of the district court is certainly appealable. Hence, even if the district court was without jurisdiction, that would be no ground for dismissing this appeal, but for a reversal of the judgment; and as the appellants here make no such point, and do not ask for a reversal on any such ground, we have no occasion to consider the question.

The only question in the case is as to the construction of section 63 of the probate act of 1889 (G. S. 1894, § 4470), and particularly of the clause "free from any testamentary devise or other disposition to which the surviving husband or wife shall not have assented in writing." Assuming (what I personally very much doubt) that this was intended to apply to all that follows, and is operative, not

only in favor of the surviving spouse, but also in favor of the issue of the deceased under the second and third subdivisions, and in favor of collateral heirs, under the fourth subdivision of the section, it is sufficient, for the purposes of this appeal, to say that it has no application to the facts of this case, for the reason that there was no "surviving husband or wife." The very language of the statute limits it to cases where the deceased leaves a surviving spouse. The word "surviving" manifestly refers to the time of the death of the testator, and not to the time the will was executed. A will takes effect only on the death of the testator. Until then it is ambulatory.

Judgment affirmed.

ANDREW E. JOHNSON v. MINNESOTA LOAN & TRUST COMPANY.

December 16, 1898.

Nos. 11,476—(161).

Death of Wife—Descent of Realty—Liability for Debts—Goodwin v. Kumm Limited.

During the lifetime of a married woman her real estate was sold on execution under a judgment against her. There was no redemption from this sale. Subsequently the woman died, leaving her husband surviving her. Under the doctrine of *Dayton v. Corser*, 51 Minn. 406, one undivided third of this property descended, under the statute, to the surviving husband, unaffected by the execution sale on the judgment against his wife. *Held*, that this third descended to the husband, "subject in its just proportion, with the other real estate, to the payment of such debts [of the wife] as are not paid from the personal estate," as provided in G. S. 1894, § 4471. *Goodwin v. Kumm*, 43 Minn. 403, limited.

The petition of the executor of the estate of May I. Dayton, deceased, for license to sell all her real estate for the payment of her debts was granted by the probate court for Ramsey county, Willrich, J. The facts are stated in the opinion. Andrew E. Johnson, who had objected to the petition, appealed from the order of license to the district court for that county. The executor having died,

the Minnesota Loan & Trust Company was substituted as administrator with the will annexed, and the matter was heard by Otis, J., who affirmed the order of the probate court. From a judgment entered pursuant to this order, Andrew E. Johnson appealed. Affirmed.

Henry C. James, for appellant.

In *Reynolds v. Fleming*, 43 Minn. 513, the court, construing what is now G. S. 1894, § 5471, held that, upon the expiration of the time for redemption, the purchaser on execution sale acquires all the right, title, interest and claim which the debtor had, and that the sheriff's deed carries with it all that the debtor's deed could. See *Conner v. Long*, 63 Iowa, 295. The judgment in the case of *Dayton v. Corser*, 51 Minn. 406, is conclusive upon the estate, and cannot be attacked here. *Allis v. Davidson*, 23 Minn. 442; *Thompson v. Myrick*, 24 Minn. 4; *Adams v. Adams*, 25 Minn. 72. The cases of *Dayton v. Corser*, *supra*, and *Goodwin v. Kumm*, 43 Minn. 403, have been frequently cited and followed by this court. *Williamson v. Selden*, 53 Minn. 73; *Holmes v. Holmes*, 54 Minn. 352; *Ortman v. Chute*, 57 Minn. 452; *Luse v. Reed*, 63 Minn. 5; *Merrill v. Security Trust Co.*, 71 Minn. 61. A purchaser at execution sale, when there is no redemption, is entitled to have the property as it existed at the time it was struck off to him. *Whitney v. Huntington*, 34 Minn. 458; *Moritz v. City of St. Paul*, 52 Minn. 409; *Reynolds v. Fleming*, *supra*; *Lindley v. Crombie*, 31 Minn. 232.

Hahn, Belden & Hawley, for respondent.

The interest of the surviving spouse in the other's real estate is no longer to be confused with dower and curtesy. *Scott v. Wells*, 55 Minn. 274; *Merrill v. Security Trust Co.*, 71 Minn. 61. But this interest is subject to the payment of the debts of the deceased spouse. *State v. Probate Court*, 40 Minn. 296; *Byrnes v. Sexton*, 62 Minn. 135. The statute (G. S. 1894, § 5471) postpones the passing of the title acquired at execution sale to the expiration of the time for redemption. *Parke v. Hush*, 29 Minn. 434; *Buchanan v. Reid*, 43 Minn. 172; *Lindley v. Crombie*, 31 Minn. 232. Until that time the owner still retains the legal title. *Whiting v. Butler*, 29 Mich.

122. The doctrine of relation is not applicable here. See 20 Am. & Eng. Enc. 727; *Gibson v. Chouteau*, 13 Wall. 92; *Jackson v. Douglass*, 5 Cow. 458.

MITCHELL, J.

May I. Dayton, a married woman, was the owner of certain real estate. On January 26, 1891, this property was sold on execution on a judgment rendered against her and in favor of Corser & Co., and bid in by the judgment creditors. There was no redemption from this sale. May I. Dayton died June 8, 1891, leaving her husband, Lyman C. Dayton, surviving. In September, 1891, her husband, as special administrator of her estate, and also in his own personal right, commenced an action against Corser & Co. to set aside the execution sale, and for general relief. This action resulted in a judgment holding the execution sale valid, but that the statutory interest of the surviving husband was not divested or affected by it, and therefore that Corser & Co., the purchasers at the sale, were the owners of an undivided two-thirds, and Lyman C. Dayton as surviving husband, of one undivided third, of the property. This judgment was affirmed by this court in *Dayton v. Corser*, 51 Minn. 406, 53 N. W. 717.

The same property was, in October, 1893, sold on execution under judgment rendered in April, 1893, in favor of one Engle against Lyman C. Dayton, and bid in by one Dodge, who afterwards (there being no redemption from the sale) conveyed to the appellant, Johnson. In February, 1896, the executor of May I. Dayton petitioned the probate court for license to sell the property to pay debts which had been proved against her estate. It is conceded that, if the estate of May I. Dayton had any interest in the property which was subject to the payment of debts, a sale was necessary; but Johnson objected to granting the petition on the ground that the estate had no such interest, and therefore a sale under an order of the probate court would merely cast a cloud on his title. The court granted the executor's petition, and thereupon Johnson appealed to the district court, which affirmed the order of the probate court, and from that judgment Johnson appealed to this court.

The Minnesota Loan & Trust Company is administrator with the

will annexed of the estate of May I. Dayton, having been appointed in place of the executor, who had died.

The only question in the case is whether, under these facts, this undivided third of the property, which, under the statute, as construed in *Dayton v. Corser*, supra, descended to Lyman C. Dayton as surviving husband, and was not divested or affected by the execution sale on the Corser judgment, is subject to the payment of its just proportion of the debts of the deceased wife which were proved as claims against her estate. G. S. 1894, § 4471. The only doubt or difficulty in the case grows out of the earlier decisions of this court in *Goodwin v. Kumm*, 43 Minn. 403, 45 N. W. 853, and *Dayton v. Corser*, supra, construing this section of the statute of descents. We are now satisfied that in what was said or decided in those cases we failed to appreciate fully the differences between the common-law estates by curtesy and of dower, and the statutory interest of a surviving spouse in the real estate of his or her deceased spouse, and especially the fact that the latter (other than in the homestead) was made subject with the other real estate to the payment of its just proportion of the debts of the deceased spouse.

In *Goodwin v. Kumm*, supra, all that was required to be decided was that, if it is sought to subject the interest of a surviving spouse in the real estate of the deceased spouse for the payment of the debts of the latter, it must be done in the administration proceedings in the probate court. This is the only point upon which the decision in that case should be relied on as authority. Whatever else is said in the opinion was dicta, or at least unnecessary to the decision of the case.

All that was decided in *Dayton v. Corser*, supra, was that the inchoate contingent statutory interest of a husband or wife in the real estate of his or her spouse is not divested or affected by a sale of the property on execution against such spouse. Thus far the decision must be adhered to as having become a rule of property, and must remain the law unless changed by statute. But the decision should not be extended one whit beyond the exact point decided, either by way of analogy or for the sake of logical consistency. Under the decision in that case one undivided third of this

property descended under the statute to the surviving husband wholly unaffected by the sale on the Corser judgment.

Why, under the same statute, did it not descend "subject, in its just proportion with the other real estate, to the payment of such debts of the deceased as are not paid from the personal estate"? It is urged that to so hold would be to take this one-third from the judgment creditor, who obtained a lien on the property during the life of the deceased, and give it to the general creditors who happened to be such at the time of her death; also that by statute a judgment is a lien on all the real estate of the debtor; also that so to hold would be to make the property twice subject to the payment of debts,—first on the execution sale, and again in the administration proceedings. But it seems to us that this is begging the question, and reasoning in a circle. The lien of the Corser judgment was, under the doctrine of *Dayton v. Corser*, subject to the husband's inchoate statutory interest in the property, and if Corser & Co. never had or acquired any interest in or right to this inchoate interest of the husband, it cannot be said that it has been taken away from them; and, if it was not sold or transferred by the execution sale, it has never been subjected to the payment of Mrs. Dayton's debts; and, if it is not now subjected to their payment in the administration proceedings, it follows that it descended to the surviving husband without being subjected at all to the payment of any part of the debts of his deceased wife. Of course, Dodge, the purchaser at the execution sale, and his grantee, Johnson, acquired the same rights, and no greater, in the property as those acquired by the surviving husband under the statute.

Counsel suggests that an affirmance of the judgment of the district court would result in serious practical evils by rendering titles to real estate uncertain. We see no special force in this suggestion. It would not render titles any more uncertain than in many other cases where title passes by devolution of law or through proceedings in the probate court.

The fact that there was no redemption of the other two-thirds of the property from the sale under the Corser judgment has no bearing on the case. Neither do we attach any importance to the fact that Mrs. Dayton died before the expiration of the year for redemp-

tion, and hence while the legal title of the whole property was still in her.

Judgment affirmed.

JOSEPH CARPENTER v. R. M. COLES and Another.

December 16, 1898.

Nos. 11,478—(190).

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78	104

Adverse Possession—Intent of Disseisor—Statute of Limitations.

All that is necessary to render possession of lands adverse, so as to set the statute of limitations in motion, is that the disseisor enter and take possession with the intention of holding the lands for himself to the exclusion of all others.

Same—Color of Title.

It is not necessary that he should enter under color of title, or under a claim that he has a legal right to enter.

Appeal by defendants from an order of the district court for Washington county, Crosby, J., denying their motion for a new trial after a verdict in favor of plaintiff. **Reversed.**

J. N. Castle, for appellants.

The effect of color of title, where an entry is made and possession taken and held in accordance with it, is to define the extent of the possession claimed. *Washburn v. Cutter*, 17 Minn. 335 (361); *Sage v. Larson*, 69 Minn. 122. All adverse possession is a trespass. *Costello v. Edson*, 44 Minn. 135. See also *Sage v. Morosick*, 69 Minn. 167; *Sage v. Larson*, *supra*; *Brown v. Kohout*, 61 Minn. 113.

Geo. E. Budd, for respondent.

Where there is no claim of right, the possession cannot be adverse to the true title. *Harvey v. Tyler*, 2 Wall. 328; *Ewing v. Burnet*, 11 Pet. 41; *Hogan v. Kurtz*, 94 U. S. 773; *Holtzman v. Douglas*, 168 U. S. 278. To substantially the same effect is *Brown v. Kohout*, 61 Minn. 113; *Sage v. Rudnick*, 67 Minn. 362; *Village of Glencoe v. Wadsworth*, 48 Minn. 402; *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 63 Minn. 330; *Dean v. Goddard*, 55 Minn. 290;

Beasley v. Howell, 117 Ala. 499; Maple v. Stevenson, 122 Ind. 368; Heller v. Cohen, 154 N. Y. 299; Ballard v. Hansen, 33 Neb. 861; Hayden v. McCloskey, 161 Ill. 351; Hintrager v. Smith, 89 Iowa, 270; Sancrainte v. Torongo, 87 Mich. 69; Atkinson v. Smith (Va.) 24 S. E. 901; Wade v. Johnson, 94 Ga. 348; Thompson v. Felton, 54 Cal. 547; Wilkerson v. Eilers, 114 Mo. 245; Davis v. Bowmar, 55 Miss. 671; Turner v. Turner, 34 Tenn. 27; Sacket v. McDonnell, 8 Biss. 394; 1 Am. & Eng. Enc. 228.

MITCHELL, J.

Action of ejectment. Defense, title by 15 years' adverse possession. The court instructed the jury as follows:

"Did the defendants enter into the possession of the land fifteen years before September 1, 1897, the time this action was commenced, under a claim of right so to do, and have they remained in the actual, open, continuous, hostile and exclusive possession since that time with the intent of claiming it adversely?"

"A person has not any right, arbitrarily and without any claim of right, knowing that he has no right whatever, to go and take with a high hand wrongful possession of land, and avail himself of the statute of limitations."

"A person cannot view a piece of land that he has no kind of interest in, no title to, and enter upon it with a view of occupying it fifteen years, and by so occupying, occupy wrongfully and without any claim of right, and does this with a view of invoking the statute of limitations."

The meaning of these instructions is that the statute will never run in favor of a disseisor whose adverse possession originated in a naked and wilful trespass; that to set the statute in motion the entry must have been made under some color or claim of title which the disseisor claimed gave him the legal right to enter. This is clearly incorrect, for the books are full of cases where tortious entries upon and possession of land without any pretense of title or rightful claim to the land have ripened into title of adverse possession. "A disseisor," says Lord Coke, "is where one enters intending to usurp the possession, and to oust another of his freehold." So the whole inquiry is reduced to the fact of entering and the intent of the disseisor to usurp possession for himself to the exclusion of others.

Wherever the proof is that the one in possession entered and holds for himself to the exclusion of all others, the possession so held is adverse, and, if such possession is continued the sufficient length of time, it will ripen into title, regardless of the good faith or the bad faith of the disseisor, or whether he claimed the legal right to enter, or avowed himself a wrongdoer. The two essential elements are possession and adverse intent. The misapprehension on the subject arises from the somewhat misleading, if not inaccurate, terms frequently used in the books to express this adverse intent, such as "claim of right," "claim of title," and "claim of ownership." These terms, when used in this connection, mean nothing more than the intention of the disseisor to appropriate and use the land as his own to the exclusion of all others.

To make a disseisin it is not necessary that the disseisor should enter under color of title, or should either believe or assert that he had a right to enter. It is only necessary that he enter and take possession of the lands as if they were his own, and with the intention of holding for himself to the exclusion of all others. This appropriation once made, and possession once begun, the presence or absence of good faith of the possessor, or whether the possession originated in a naked trespass, or was taken under color or claim of title, is wholly immaterial.

The question of color of title is only material in so far as the possession claimed is derived from and depends upon the instrument constituting the color of title; that is, it applies only to the constructive possession which such an instrument gives the claimant under it. See *Sedgwick & W. Tit. c. 29*; *Bryan v. Atwater*, 5 Day, 181. This adverse intent to oust the owner, and possess for himself, may be generally evidenced by the character of the possession and the acts of ownership of the occupant; and according to the bill of exceptions evidence of this character was introduced from which the jury would, in the absence of any explanatory evidence, have been justified in finding that the defendants' possession was adverse. Hence, presumably, the error in the charge was prejudicial.

Order reversed, and a new trial granted.

BERTINA M. PARDOE v. DANIEL MERRITT and Others.

December 20, 1898.

Nos. 11,242—(113).

Guardian and Ward—Sale of Personalty—Presumption as to Law of Another State.

It is the American common-law doctrine that a general statutory guardian may sell the personal estate of his ward without an order of the court appointing him; therefore the courts of this state will, in the absence of evidence of a statute to the contrary, presume that by the laws of a sister state such a guardian is authorized so to sell his ward's personal property.

Soldier's Additional Homestead—Sale of Right by Guardian.

The right to enter a soldier's additional homestead, given by R. S. (U. S.) § 2307, is personal property, and may be sold as such by the general guardian, where such right is owned by his ward.

Same—Blank Power of Attorney—Cox v. Manvel Distinguished.

The plaintiff, when a minor, owned such a right of entry, and her guardian sold it for value, and, to make the sale effectual, there was inserted in the written assignment of the right an irrevocable power of attorney to make the entry, and to convey the land to be entered, for the sole benefit of the person owning the right, but the name of the attorney was left blank in the assignment, with the intent that any assignee of the right might fill the blank. An assignee of the right inserted in the assignment the name of his attorney, who made the entry in the name of the plaintiff, and then conveyed the land as such attorney to such assignee. *Held*, distinguishing *Cox v. Manvel*, 50 Minn. 87, that the power was valid, and that the grantees of such assignee are the actual owners of the land so located.

Findings Sustained by Evidence.

Held, that the evidence sustains the findings of fact by the trial court.

From an order denying plaintiff's motion to amend the findings, and from a judgment in favor of defendants, entered in the district court for St. Louis county in pursuance of an order of Moer, J., plaintiff appealed. *Affirmed*.

H. H. Hoyt, for appellant.

Keyes & Baldwin, for respondents.

START, C. J.

The short facts of this case, as found by the trial court, are these: The plaintiff, then Bertina M. Webb,—a minor, and the surviving child of Alfred P. Webb, deceased, who was an honorably discharged soldier of the Union army,—was on July 27, 1881, by reason of her mother's remarriage, entitled to an additional homestead entry, of not exceeding 80 acres, as provided by R. S. (U. S.) § 2306. On that day her mother, then Ellen J. Lawson, was duly appointed her guardian by the county court of the county of Butler, in the state of Nebraska, where they then resided, and on the same day the guardian executed an application to the department of the interior for the purpose of obtaining a certificate showing that her ward was entitled to such additional entry. She also, as such guardian, on the same day sold and assigned such right of entry for a valuable consideration then paid to her; and, for the purpose of effectuating such sale and enabling the purchaser to secure the benefits thereof by a resale, the guardian executed and delivered an assignment or a bill of sale of such right of entry, containing an irrevocable power of attorney, authorizing the purchaser to make the entry and convey the land so entered for his own benefit. This instrument is designated as "Exhibit A" in the findings, and is substantially similar to the instrument under consideration in the case of Webster v. Luther, 50 Minn. 77, 52 N. W. 271.

When this instrument (Exhibit A) was executed and delivered by the guardian it did not contain the name of the person to whom the right purported to be assigned, or a description of the land to be entered by virtue thereof, but the places for writing in such name and description were left blank, with the intent that the same should be filled with such name, and with the description of such lands as should be desired by the person making a location of land by virtue of such right of entry. Thereafter the right of entry was sold and transferred to Leonidas Merritt, and the name of Thomas H. Pressnell was inserted in the blank left in the instrument for the name, and the description of the land described in the complaint was also inserted therein; who, acting under and by virtue of such instrument, made entry of the land in the name of Bertina M. Webb, the plaintiff, which was done without the knowledge or

consent of the plaintiff or her guardian. He afterwards, by virtue of such instrument, executed deeds of the land as such attorney, purporting to convey an undivided interest thereof to Leonidas Merritt and Edward Byrne, respectively. The defendants in this action have acquired, through mesne conveyances, all the title and interest of such grantees in the land so entered. The trial court found that, by the laws of the state of Nebraska, the guardian of the plaintiff had full power to sell and assign the right of her ward to make such additional entry. The rules of the general land office did not permit the entry of such additional homesteads, except in the name of the person having the original right. A patent for the land so entered was issued to Bertina M. Webb, in her name, pursuant to the entry made as herein stated.

The conclusion of law by the trial court was to the effect that defendants are the actual owners of the land in question, and that the plaintiff holds the legal title thereto in trust for them, and that she execute to them a deed thereof. The plaintiff made a motion for additional findings, which was denied, and judgment was entered for the defendants. The plaintiff appealed from the order and the judgment.

The plaintiff claims that the trial court erred in finding that by the laws of the state of Nebraska the guardian had authority to sell and assign the right of entry belonging to her ward. It is conceded that no evidence was offered as to the laws of Nebraska. Counsel for respondents claim that the court will presume, in the absence of evidence to the contrary, that the laws of another state are the same as those of our own. But there is no presumption that the statutory law of a sister state is the same as our own. In the absence of evidence, it will be presumed that the common law is in force in such states. *Myers v. Chicago, St. P., M. & O. Ry. Co.*, 69 Minn. 476, 72 N. W. 694.

The American common-law doctrine is that a general statutory guardian may sell the personal estate of his ward without a previous order of court appointing him. *Schouler*, Dom. Rel. §§ 347, 355; *Humphrey v. Buisson*, 19 Minn. 182 (221). It therefore necessarily follows that, if this right of entry was personal property, the find-

ing of the court complained of is supported by the presumption, and that the guardian had authority to sell and assign it.

Is the right to enter an additional homestead given by R. S. (U. S.) § 2306, personal estate? This question must be answered in the affirmative. It was so held in the case of *Mullen v. Wine*, 26 Fed. 206. The reason why it is personal property was tersely stated in the opinion in the case cited by Brewer, J., in these words:

"This right to enter and locate 80 acres was a thing of value; * * * was property. It was personal property, going with them [the owners] where they went; could be exercised and enjoyed anywhere; did not descend to the heir; was not attached to any particular tract of land; was therefore neither permanent, fixed nor immovable. It was a mere right of selection and taking."

Such right of entry is not only personal property, but it may be sold and assigned in the same manner as any other personal property, without complying with the law as to the conveyance of real estate. *Webster v. Luther*, 50 Minn. 77, 52 N. W. 271; *Tuman v. Pillsbury*, 60 Minn. 520, 63 N. W. 104; *Mullen v. Wine*, supra; *Webster v. Luther*, 163 U. S. 331, 16 Sup. Ct. 963. The case last cited affirms the decision of this court in the same case, and cites with approval the case of *Mullen v. Wine*.

The evidence is sufficient to sustain the finding of the trial court to the effect that Ellen J. Lawson executed Exhibit A as guardian of the plaintiff, and that it was intended to be an absolute sale and assignment of her ward's right of entry, and that such right was afterwards sold to Leonidas Merritt. The right was personal property, and no formality was required in transferring it. It would pass on the delivery of Exhibit A, as the right to locate a land warrant assigned in blank passes by delivery.

The original instrument (Exhibit A) was an assignment or bill of sale of the right, and the power of attorney was incorporated therein, and the name left blank for the purpose of enabling the person who should ultimately purchase and exercise the right of entry to secure the benefits thereof to himself. The power of attorney was necessary, in view of the practice of the land department in refusing to recognize any assignment of the right of entry. And to the end that the full beneficial ownership of the right of

entry might be made available to the assignee, so that he might resell it as personal property or make the entry himself, as he might elect, the name and description were left blank in the assignment, with the intent that the blanks should be filled by any owner who should elect to make the entry. The trial court so found as a fact, and the evidence sustains the finding. The blanks in the original assignment having been designedly left for this purpose and intent, such owner was authorized to fill the blanks by naming an attorney to make the entry, and thereafter to convey the land to him. Therefore, when the name of such attorney was inserted in Exhibit A, it became and was just as valid and effectual for all purposes as if it had been inserted therein before the execution thereof. The statute (G. S. 1894, § 4203) so expressly provides. This brings this case within the decision of this and the supreme court of the United States in *Webster v. Luther*, *supra*.

The plaintiff, however, claims that there was a limitation on the power of the guardian in this case to leave the name of the attorney blank, and thereby delegate the selection of an attorney to the purchaser, and that this case falls within the rule of *Cox v. Manvel*, 50 Minn. 87, 52 N. W. 273, and s. c. 56 Minn. 358, 57 N. W. 1062, in which it was held that, where the guardian was authorized and directed by the court to appoint a suitable attorney to locate the additional homestead and dispose of it, a blank power of attorney—that is, no person being named as attorney—to make the location was void. The only basis of fact for the claim in this case is that more than a year after the execution and delivery of Exhibit A, and on September 2, 1882, but before an actual entry of the land was made in this case, the court appointing the guardian made an order similar to the order in *Cox v. Manvel*, a copy of which was attached to Exhibit A and filed in the land department. It does not appear upon whose application this order was made, but the trial court did find as a fact that it was not made on the application of either the plaintiff or her guardian, and neither knew that it had been applied for or made until after it was made. It is manifest that this order has nothing to do with this case, for the sale and assignment of the right of entry had been made, and the rights

of the parties had become vested, long before the making of this order.

This case does not differ essentially in its facts from the cases of Webster v. Luther and Tuman v. Pillsbury, in which the validity of the title of the assignee of the right to enter a soldier's additional homestead was sustained. It follows that the trial court did not err in its findings of fact or conclusions of law, and that the judgment appealed from must be affirmed.

So ordered.

CANTY, J.

I concur in the foregoing opinion so far as it holds that the right to enter the soldier's additional homestead was personal property and that the guardian had the power to sell it and did sell it. But the right was located and the patent issued in the name of the ward. What was once personal property had now become real estate, and the title to it, being in the name of the ward, could not be transferred by a blank power of attorney executed by the guardian.

The case is similar to any other where the United States government issues a patent to the wrong party,—a court of equity will declare that it is held in trust for the rightful owner. That was done in this case, and in my opinion the judgment should be affirmed.

NANNIE M. McLACHLAN v. J. F. CARPENTER and Others.

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December 20, 1898.

Nos. 11,244—(124).

Tax Sale—Purchase by State—State Assignment Certificate—Interest on Subsequent Taxes—Redemption.

Held, following Berglund v. Graves, 72 Minn. 148, to the effect that where a person obtains a state assignment of lands bid in by the state at a tax sale, he must pay the interest on subsequent delinquent taxes from the time they became delinquent, and the owner who redeems

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thereafter must pay interest from the date of the assignment on this interest as well as on all other sums which the assignee was lawfully required to pay.

Appeal by defendant William Craig from a judgment in favor of plaintiff, entered in the district court for St. Louis county, pursuant to the order of Cant, J. Reversed.

Draper, Davis & Hollister and H. J. Grannis, for appellant.

O. L. Young and M. Douglass, for respondent.

BUCK, J.

1. This action was brought to determine adverse claims to lots 101, 103, 105, 107 and 109 in block 34, Duluth Proper, Third Division. The plaintiff claims title, and her possession is admitted by the defendant, who denies that plaintiff is the owner of said lots, and he claims ownership thereof in fee simple through certain tax proceedings.

The cause was tried by the court without a jury, and resulted in its finding of fact to the effect that the plaintiff on January 1, 1891, was the owner of the lots, and that her title thereto had never been divested. Parties other than Craig purchased the lots at tax sale, through whom he claims title by purchase from them. These lots were duly assessed for taxes in the year 1891, which, remaining unpaid, proceedings were duly had as provided by the tax law for their collection, so that on May 1, 1893, each of said lots was duly sold separately, pursuant to a tax judgment for said taxes of 1891, and struck off to the state of Minnesota at said tax sale for the respective sums so due.

On October 22, 1895, the tax certificate on each of said lots was duly assigned to the defendant Dearbourn on account of said sale for taxes for the year 1891, and subsequent delinquent taxes, penalties, costs and interest for the years 1892 and 1893. The said sums paid for the several tax assignment certificates were included, each in the tax assignment certificate for the lot described in it respectively, as the amount paid for said tax assignment certificate. The taxes for the years 1892 and 1893 were never reduced to judgment, and hence no judgment was ever entered for the taxes on any of the lots for delinquent taxes of these years.

After the expiration of three years' time from the date of said sale for taxes for the year 1891, notices of the expiration of the time to redeem were duly issued, served, and proof thereof filed in the office of the auditor of the county of St. Louis, in which county the lots are situated. No redemption of any of said lots from said tax sale has ever been made. Dearbourn conveyed the right acquired by him under his purchase to the defendant Craig.

The trial court found in favor of the plaintiff, and that she was the sole and absolute owner in fee simple of each of said lots. The defendant Craig alone appeals to this court.

It is the contention of the defendant that the plaintiff was divested of her title to said lots by the tax proceedings, notwithstanding the several certificates of assignment from the state and the notice of expiration of the time to redeem included the taxes, with interest thereon for the years 1892 and 1893, which had not been reduced to judgment and sale.

The contention of plaintiff is directly to the contrary. We are of the opinion that this phase of the case, based on the facts above stated, is controlled by the case of Berglund v. Graves, 72 Minn. 148, 75 N. W. 118. In that case it was held that

"A person obtaining a state assignment of lands bid in by the state at a tax sale must pay interest on subsequent delinquent taxes from the time they became delinquent, and the owner who redeems thereafter must pay interest from the date of the assignment on this interest as well as on all other sums which the assignee was legally required to pay."

This decision is applicable to this case, and, if the party redeeming must pay such interest, it cannot be illegal to include it in the certificate of assignment from the state, and notice of expiration of the time to redeem. This proposition seems self-evident, hence it was error for the trial court to rule or find that the tax proceedings did not divest the plaintiff of her title to the premises in controversy, and the judgment appealed from should be reversed.

It is therefore unnecessary to pass upon the question as to the validity of the sale of lot 101, by virtue of a judgment rendered for

nonpayment of the assessment made by the city of Duluth in the year 1891 against said lot for public improvements.

Judgment reversed.

CARRIE M. JOHNSON v. DAVID D. STEWART.

December 20, 1898.

Nos. 11,284—(159).

Foreclosure—Assignment of Certificate of Sale—Action for Surplus by Mortgagor.

The mere fact that the mortgagee assigns his certificate of foreclosure sale, on being paid the amount of his bid and interest thereon to a third party, at the request of the mortgagor, does not estop the latter from recovering the surplus which the mortgagee retained from the proceeds of the foreclosure sale.

Action in the district court for Hennepin county to recover \$102, the amount of the attorney's fee and expenses of sale on foreclosure of mortgage by advertisement, on the ground that no affidavit of costs and disbursements of sale was filed within the statutory time. From a judgment in favor of plaintiff for \$100, entered pursuant to the order of Harrison, J., defendant appealed. Affirmed.

S. A. Reed, for appellant.

A conveyance of the equity of redemption includes the right to the surplus in the foreclosure sale. *Brown v. Crookston Agric. Assn.*, 34 Minn. 545; *Ness v. Davidson*, 49 Minn. 469; *Fagan v. Peoples Sav. & L. Assn.*, 55 Minn. 437. Plaintiff is estopped to recover the surplus, as the assignment of the certificate was made at her request. *Erkens v. Nicolin*, 39 Minn. 461; *Perkins v. Trinka*, 30 Minn. 241; *Hall v. Wheeler*, 37 Minn. 522; *Shane v. City of St. Paul*, 26 Minn. 543.

Smith & Smith, for respondent.

START, C. J.

This is an action to recover a surplus remaining in the hands of the defendant on the foreclosure under a power of sale in a real-

estate mortgage executed by the plaintiff to the defendant. Judgment for the plaintiff, from which the defendant appealed.

This case is essentially the same, in fact and principle, as the case of Perkins v. Stewart, *infra*, heard at the same time, and is ruled by it, with one exception. In this case the plaintiff, some ten months after the foreclosure sale, conveyed her equity of redemption in the mortgaged premises to a third party, and upon her request the defendant assigned to him his certificate of sale on the mortgage foreclosure, upon being paid the amount of his bid and interest. Other than this, the facts in the two cases are identical, except as to names, dates and amounts.

The defendant claims that the plaintiff is estopped to recover the surplus, because he assigned the certificate at her request. The defendant did not assign the certificate in reliance upon any representation, direct or otherwise, by the plaintiff, as to the surplus, and there was no element of estoppel in the transaction. It was simply one in which the defendant, before the expiration of the time for redemption, was paid the amount due on his certificate, and, instead of giving a certificate of redemption, he, at plaintiff's request, assigned the certificate to a third party. True, he was not bound to do so, but the naked fact that he did, in no manner affected the plaintiff's right to recover the surplus. She had the same right to recover the surplus after the assignment as she would have had if she had redeemed. See *Spottswood v. Herrick*, 22 Minn. 548.

Judgment affirmed.

ALBERT A. PERKINS v. DAVID D. STEWART.

December 20, 1898.

Nos. 11,285—(160).

Foreclosure—Affidavit of Costs—Constitution.

G. S. 1894, § 6051, requiring a party foreclosing a mortgage by advertisement to make and file for record, within ten days after such foreclosure, an affidavit of the amount paid or incurred, and included therein, for disbursements, including attorney's fees, is constitutional.

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75	21
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Ownership of Surplus upon Foreclosure.

The surplus remaining in the hands of the mortgagee, after the payment of his debt from the proceeds of a foreclosure sale of the mortgaged premises, belongs to the same persons, and is subject to the same liens, as the land at the time of the sale. If the mortgagor is then the sole owner of the land, subject only to the mortgage, he is entitled to such surplus, although judgments are, thereafter and before it is paid to him, docketed against him, which are a lien on his equity of redemption in the land.

Surplus—Demand—Interest.

It is the duty of a mortgagee foreclosing under a power of sale promptly to ascertain the surplus, if any there be, and pay it over to the party entitled thereto, without any previous demand therefor. If he fails so to do, he is chargeable with interest from the time he received it, except in cases where he could not pay it on account of the absence of the mortgagor, or of adverse claims, or for some other good reason, and the fund remained unproductive in his hands.

Appeal by defendant from a judgment in favor of plaintiff for \$192.13, entered in the district court for Hennepin county, pursuant to findings and order of Harrison, J. Affirmed.

S. A. Reed, for appellant.

A lien upon the equity of redemption is also a lien upon any surplus of the foreclosure sale. *Brown v. Crookston Agric. Assn.*, 34 Minn. 545; *Ness v. Davidson*, 49 Minn. 469; *Fagan v. Peoples S. & L. Assn.*, 55 Minn. 437; 2 *Jones*, Mort. §§ 1687, 1688.

The right to interest depends upon whether the defendant used the money, or was in default in not paying it over. *Wood v. Robbins*, 11 Mass. 503; *Johnson v. Eicke*, 7 Hals. (N. J. L.) 316; *Knight v. Reese*, 2 Dall. (Pa.) 182; *Bell v. Logan*, 7 J. J. Marsh. 594; *Johnson v. Haggin*, 6 J. J. Marsh. 581; *Vance v. Vance*, 5 T. B. Mon. 521. Where one has used the money of another, or where he is wrongfully in possession of it, he is chargeable with interest. *Dodge v. Perkins*, 9 Pick. 368; *Goddard v. Bulow*, 1 N. & McC. 45; *Wood v. Robbins*, supra; *Winslow v. Hathaway*, 1 Pick. 210; *Chauncey v. Yeaton*, 1 N. H. 151; *Lynch v. De Viar*, 3 Johns. Cas. 302, 310; *Simpson v. Feltz*, 1 McCord, Ch. (S. C.) 213; *Black v. Heyward*, 1 Bailey (S. C. L.) 201; *Rapelie v. Emory*,

1 Dall. (Pa.) 349; Shipman v. Miller, 2 Root, 405. In the latter case no demand is necessary. Atlantic v. Harris, 118 Mass. 147; Cooper v. Coates, 21 Wall. 105; Paige v. Willet, 38 N. Y. 28; Wood v. Robbins, *supra*. Though in many cases demand is essential to fix the default, before interest can be allowed. Dodge v. Perkins, *supra*; Hunt v. Nevers, 15 Pick. 500; National v. Lovering, 30 N. H. 511; Bartlett v. Marshall, 2 Bibb (Ky.) 467; Wells v. Abernethy, 5 Conn. 222.

Smith & Smith, for respondent.

The surplus arising at a foreclosure sale is a mere personal chattel owned by the mortgagor. See G. S. 1894, § 6046; Fagan v. Peoples S. & L. Assn., 55 Minn. 437. A judgment entered after such a sale is no lien on the surplus. 2 Freeman, Judg. § 349; Sweet v. Jacocks, 6 Paige, 355. Nor does a judgment lien attach to such a right in any event. 12 Am. & Eng. Enc. 107, 108; 2 Freeman, Judg. § 348; Morrow v. Brenizer, 2 Rawle (Pa.) 184; Thomas v. Simpson, 3 Pa. St. 60.

G. S. 1894, § 6051, having been enacted long before the mortgage was executed it became a part of the mortgage contract. Johnson v. Northwestern L. & B. Assn., 60 Minn. 393.

When one has received money of another, and has not a right to keep it, the law imposes interest as damages. 11 Am. & Eng. Enc. 397; Greenly v. Hopkins, 10 Wend. 97; Reid v. President, 3 Cow. 393. Where the law makes it the duty to pay over money to the owner without any previous demand, no demand is necessary to recover interest. 5 Am. & Eng. Enc. 528; Dodge v. Perkins, 9 Pick. 368; Foote v. Blanchard, 6 Allen, 221; Sedgwick, Dam. §§ 168, 170, 176. A purchaser at a sheriff's sale must pay interest on his bid, or so much of it as is not applicable to his own judgment. 11 Am. & Eng. Enc. 390; Atkinson v. Richardson, 15 Wis. 657; Morris v. Cain, 39 La. An. 712.

START, C. J.

The plaintiff executed a mortgage upon real estate owned by him to the defendant. Default was made in the conditions of the mortgage, and the defendant foreclosed it by advertisement by virtue

of the power of sale therein, and became the purchaser of the land at the sale on September 12, 1894. The mortgaged premises sold for the full amount due on the mortgage, and \$135 in excess thereof; of which \$100 was applied in payment of attorney's fees, \$25 in payment of the costs and disbursements of the foreclosure, and \$10 in payment of excessive interest. No money was received by the defendant on such sale, and he paid none to the sheriff making the sale, except his fees, \$3. The usual certificate of sale was executed to the defendant by the sheriff. No affidavit of the costs, disbursements and attorney's fees on the foreclosure of the mortgage was ever made by or on behalf of the defendant. No redemption was made from such foreclosure sale, and the defendant became the absolute owner of the mortgaged premises by virtue thereof.

After the foreclosure sale, and on June 28 and August 22, 1895, respectively, judgments were recovered and docketed against the plaintiff, and became a lien on the plaintiff's equity of redemption in the premises. Neither of the judgments has ever been paid. No demand was made on the defendant for the surplus before this action was brought. The defendant is not a resident of this state. This was an action to recover the surplus, and on these facts the trial court ordered judgment for the plaintiff for \$135, and interest from the time of the foreclosure sale. The defendant appealed from the judgment so entered.

1. It is claimed by the defendant that the statute (G. S. 1894, § 6051) requiring the party foreclosing a mortgage to make and file for record, within ten days after such foreclosure, an affidavit of the amount absolutely and unconditionally paid for disbursements, including attorney's fees, and included in such foreclosure, is unconstitutional, because the mortgagee's right to retain the stipulated attorney's fees was a contract right, which the legislature could not burden with the conditions of the statute. But the contract was made after the enactment of the statute and with reference to its provisions. It was competent for the legislature to provide for the proof of the amount of costs and attorney's fees paid or incurred by a party foreclosing a mortgage by advertisement, and to require a record thereof. The statute in question is similar to statutes regulating the taxation of disbursements in actions, and it is con-

stitutional. It takes away no contract right from the mortgagee, but simply provides how the right shall be made available. The amount of costs and attorney's fees on the foreclosure of mortgages which may be exacted from the mortgagor is a matter which the legislature may regulate, as to subsequent mortgages.

2. The defendant also claims, although the judgments became a lien on the plaintiff's equity of redemption in the mortgaged premises some nine months after the foreclosure sale and the time when the surplus accrued, that they were a lien on the surplus; therefore the plaintiff was not entitled to recover it, because it belonged to the judgment creditors. He relies in support of this proposition upon the cases of *Brown v. Crookston Agric. Assn.*, 34 Minn. 545, 28 N. W. 907; *Ness v. Davidson*, 49 Minn. 469, 52 N. W. 46. In both of these cases the junior lienholders, who were entitled to the surplus arising from the sale of the land on the first mortgage, to the exclusion of the mortgagor, until their liens were paid, became such prior to the time that the surplus accrued; that is, before the foreclosure sale. But in the case before us there were no such lienholders until months after the right to the surplus accrued. The cases cited are therefore not in point.

The surplus arising from a foreclosure sale of the mortgaged premises, remaining in the hands of a mortgagee after the payment of his debt, belongs to the same persons, and is subject to the same liens, as the land belonged to at the time of the sale. Their respective rights to the surplus are not affected by the sale, and it must be paid to them according to their rights in the land, as they existed before the real estate was turned into money by the sale thereof. 2 Jones, Mort. § 1935. At the time the foreclosure sale was made in this case there were no junior liens on the land, and the plaintiff was then the absolute owner thereof, subject to such sale. The surplus, therefore, belonged to him, and the right to recover it thereafter was a chose in action. *Lynott v. Dickerman*, 65 Minn. 471, 67 N. W. 1143. A subsequent sale of his equity of redemption in the land would not pass to his grantee the right to receive such surplus; nor would the judgments subsequently docketed against him become a lien thereon any more than they would on any other of his personal property.

3. The defendant's last claim is that the trial court erred in allowing plaintiff interest on the surplus from the time his right to the surplus accrued.

"The general rule is that, in all cases where the money of another is received or acquired by mistake merely, without fraud, interest does not run upon it until the party in whose possession it is, is put in default by a demand by the party to whom it is justly due." *Sibley v. County of Pine*, 31 Minn. 201, 17 N. W. 337.

But this case does not fall within the rule, for the duty rested upon the defendant, as mortgagee, to pay the surplus to the party entitled to it, and he agreed so to do in his mortgage. He was only authorized to retain from the proceeds of the sale of the mortgaged premises the amount of his debt, and the costs and attorney's fees, provided he made proof thereof as required by law. In this case all of the proceeds of the sale in excess of the debt was surplus, which he had no right to retain, and which it was his duty to pay over to the mortgagor.

It is the duty of the mortgagee foreclosing under a power of sale promptly to ascertain the surplus, if any there be, and pay it over to the party entitled to it, without any previous demand therefor. 2 *Pingrey*, Chat. Mort. § 1470; *Bailey v. Merritt*, 7 Minn. 102 (159). The defendant in this case was in default in not discharging this duty, and prima facie he should be charged with interest on the amount of the surplus, in the absence of proof of any facts so far excusing his default as to make it inequitable to require him to pay interest. In cases where the surplus cannot be paid on account of the absence of the mortgagor, or of adverse claims made to it, or for some other reason, and it remains unproductive in the hands of the mortgagee, he ought not to be charged with interest until the mortgagor returns or the adverse claims are settled. 2 *Jones*, Mort. § 1928. There were no such facts in this case. The defendant retained and had the use of the surplus, and the trial court did not err in charging him interest thereon.

Judgment affirmed.

ERIK A. ISACKSON v. DULUTH STREET RAILWAY COMPANY.

December 20, 1898.

Nos. 11,296—(102).

Street Railway—Injury to Person upon Track—Private Rule of Company—Negligence and Contributory Negligence for the Jury.

The plaintiff sued for personal injuries received while on defendant's track in a public street, and, against defendant's objection, introduced in evidence a special rule of the defendant street-railway company intended for the guidance of its motormen, which provided that "he must keep a sharp lookout to avoid running into pedestrians and vehicles, especially at cross streets. While the car is in motion, the responsibility for safe running rests with him. * * * He will be held responsible for any damage arising from negligence on his part." Plaintiff did not know of the existence of this rule, nor was there any evidence showing how long it had existed. *Held* error,—that the rule imposed a higher degree of care on the motormen than the law required, that the jury might have understood that this rule imposed upon them and the defendant an extraordinary degree of care as to travelers on defendant's track, whereas the law imposes only a reasonable degree of care and vigilance in such cases. *Held*, also, that there was sufficient evidence to justify the trial court in permitting the question of the defendant's negligence and the plaintiff's contributory negligence to go to the jury.

Appeal by defendant from an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial, after a verdict for \$2,500 in favor of plaintiff. Reversed.

Thomas S. Wood, for appellant.

John Jensvold, Jr., for respondent.

BUCK, J.

The defendant appealed from the order of the district court for St. Louis county denying a motion for judgment notwithstanding the verdict, or for a new trial, upon certain grounds stated in the moving papers.

The plaintiff, in his complaint, alleged that while he was walking upon defendant's track in a public street in the city of Duluth the defendant did carelessly, wantonly, recklessly and unlawfully run and operate one of its cars in such manner and at such a reckless

rate of speed, as to cause said car to strike and run over the plaintiff, and greatly injure him personally, for which he claimed damages. Various other acts of negligence were alleged, which we need not recite or specify. The defendant, by its answer, denied all acts of negligence on its part, and alleged that the plaintiff negligently, carelessly and recklessly placed himself in front of the car of the defendant while the same was in motion, and that the injuries which plaintiff alleges he received on said occasion were caused by and due to the plaintiff's said negligent, careless and reckless act. Upon trial before a jury it rendered a verdict in favor of the plaintiff for the sum of \$2,500.

Numerous errors are assigned, only two of which we deem it necessary to pass upon.

First, it is claimed that the verdict is not justified by the evidence. This relates, as we understand the matter, to the negligence of the defendant and the contributory negligence of the plaintiff. There are over 1,200 folios of evidence, which we have carefully examined, and we cannot say from the record that there was not sufficient evidence to justify the trial court in permitting the question of defendant's negligence and the plaintiff's contributory negligence to go to the jury.

The other error assigned, which is designated as "No. IX," and which we deem it necessary to examine, is in the following words:

"The court erred in overruling defendant's objection to the introduction in evidence by the plaintiff of rule 9 adopted by the defendant for its own protection, and the private direction and guidance of its employees, which rule is as follows:

"(9) He must keep a sharp lookout to avoid running into pedestrians and vehicles, especially at cross streets. While the car is in motion, the responsibility for safe running rests with him. He will never allow any unauthorized person (the conductor is not an authorized person) to use the handles. He will be held responsible for any damage arising from negligence on his part."

This was a special rule of the defendant company for its motormen to obey, and so designated in the book of rules furnished them by the company, and introduced in evidence by the plaintiff against the objection of the defendant. This rule is evidently intended for

the guidance of its own motormen and as a standard of duty to the company on the part of such motormen. But there is not the slightest evidence to show that the plaintiff knew or relied upon it.

Rules may be adopted by the company which impose a higher degree of care upon its employees than that imposed by the law itself. Such rules are meritorious in this, that the stricter the rules are against negligence or wilful misconduct, the more they tend to make the employee diligent and careful in his management of the car, and thus lessen the dangers which result in personal injuries either to passengers or persons on the track of a railway company. There was no evidence showing or tending to show how long this rule had been in existence, or of any custom based upon it, and, in the absence of knowledge of such custom, plaintiff could not have been influenced by it in his conduct at the time of the injury. See *Terien v. St. Paul City Ry. Co.*, 70 Minn. 532, 73 N. W. 412; *Fonda v. St. Paul City Ry. Co.*, 71 Minn. 438, 74 N. W. 166. The rule required a higher degree of care on the part of the motorman than the law imposed upon the company itself.

The plaintiff sues for the violation of duty imposed by law, not for the violation of a special rule about which he knew nothing. It was the duty of the defendant through its employees to use ordinary care not to injure persons lawfully on its track, but the rule requiring the motormen to keep a sharp lookout to avoid running into pedestrians and vehicles might well have been understood by the jury as requiring an extraordinary degree of care in such case, which is not the law. It is only a reasonable degree of care and vigilance of the street-car motormen in watching for persons upon the car track in a public highway that is required. *Anderson v. Minneapolis St. Ry. Co.*, 42 Minn. 490, 44 N. W. 518; *Ray, Neg. Imp. Dut.* 33; *Elliott, Roads & S.* 587, and cases there cited.

The duty of a street-car company requires it to exercise the greatest care and foresight while operating its road as respects its passengers, but the rule is not so strict as to persons upon its right of way, though in a public street. It is only guilty of negligence, in respect to this class of persons, when it has not used ordinary care, which, of course, embraces reasonable attention and caution upon

the part of the employee operating or controlling the car on its track. Of course, it might be liable for wanton injury inflicted upon a pedestrian under certain circumstances. So, too, it is the duty of the traveler on a car track in a public street to use ordinary care in looking out for an approaching car, and avoid injury, as the latter has the right of way.

Order reversed, and a new trial granted.

JOHN SACKS v. CITY OF MINNEAPOLIS and Others.

December 20, 1898.

Nos. 11,306—(146).

City of Minneapolis—Condemnation of Cemetery—Liability for Tort.

The charter of the city of Minneapolis authorizes it to condemn land for street and highway purposes, but it also provides that such authority shall not be construed as permitting the condemnation of any ground of any cemetery or burial place occupied for such purpose without the consent of the owner of such ground. It did, without the knowledge or consent of the plaintiff, take and condemn for street purposes his burial lot in Maple Hill Cemetery, in said city, wherein were interred five of his children, remove their bodies therefrom and bury them in one grave in said cemetery. *Held*, that the condemnation proceedings were within the general scope of its corporate power, as prescribed by its charter, but that, as it did not obtain the consent of the owner of said lot for such purpose, its acts were unauthorized and tortious, and hence it is liable to plaintiff in damages therefor.

Municipal Corporation—Action upon Unauthorized Contract—Action for Tort.

Distinction stated between actions arising on contracts made by a municipal corporation in excess of its corporate powers and actions against corporations for injuries caused by the tortious acts done by its officers and agents in the course of its business, and of their employment in excess of its powers.

Separate appeals by defendants City of Minneapolis and F. W. Cappelén, city engineer of Minneapolis, from an order of the district court for Hennepin county, Lancaster, J., overruling their demurrers to the complaint. *Affirmed*.

Frank Healy and L. A. Dunn, for appellants.

A municipal corporation is not liable for a tort committed by its agents or officers while in the performance of some act which is beyond the power of the corporation, even though the municipality may have ordered the act to be done; neither can the city ratify such act. *McCarthy v. City*, 135 Mass. 197; *Cuyler v. Trustees*, 12 Wend. 165; *Brown v. City*, 90 Mo. 377; *State v. Kirkley*, 29 Md. 85; *Cooper v. Mayor*, 53 Ga. 638; *Seele v. Inhabitants*, 79 Me. 343; *Town v. Filteau*, 10 Colo. 105; *Kreger v. Bismarck Township*, 59 Minn. 3; *Board v. Deprez*, 87 Ind. 509; *Trustee v. Schroeder*, 38 Iowa, 383; *Tiedeman, Mun. Corp.* § 338; 2 *Dillon, Mun. Corp.* § 968 (3d Ed.).

Upon the theory that Sp. Laws 1891, c. 129, is invalid, the acts of the city in the premises are wholly ultra vires and the condemnation proceedings are a nullity. Hence the respondent is still the absolute owner of the burial lot, because there has been no proper appropriation of the same to public use. *Teick v. Board of Com-mrs.*, 11 Minn. 201 (292).

Penney & McMillan, for respondent.

The law recognizes and protects the right of burial. *Larson v. Chase*, 47 Minn. 307; *Meagher v. Driscoll*, 99 Mass. 281. See also *Pierce v. Proprietors*, 10 R. I. 227.

A municipality is liable for the tortious or unlawful exercise of its corporate power. *Brink v. Borough*, 174 Pa. 395; *Welter v. City of St. Paul*, 40 Minn. 460; *Rich v. City of Minneapolis*, 37 Minn. 423; *Collensworth v. City*, 16 Wash. 224; *Donahew v. City*, 136 Mo. 657; *Norton v. City*, 166 Mass. 48; *Allison v. City*, 51 Mo. App. 133; *Dooley v. City*, 82 Mo. 444. See also *City v. Newell*, 26 Ill. 320; *Mayor v. Sheffield*, 4 Wall. 189; *Gould v. City*, 60 Ga. 164; *Walling v. Mayor*, 5 La. An. 660; *Buffalo v. City*, 58 N. Y. 639; *Ashley v. City*, 35 Mich. 296; *Weed v. Borough*, 45 Conn. 170.

BUCK, J.

The plaintiff in his complaint alleged: That on November 21, 1866, he became the owner of the north half of lot No. 2 in block 83 in Maple Hill Cemetery, in the city of Minneapolis, which he purchased for his use as a cemetery lot, and that, prior to the acts

of the defendants herein complained of, he buried in said lot five of his children and a niece, all of whom remained buried in said lot until removed by the defendants, as herein stated.

On April 11, 1891, the legislature of the state of Minnesota passed a special law authorizing the defendant city of Minneapolis to vacate or cause to be vacated part of said Maple Hill Cemetery, and to remove or cause to be removed from the part so vacated all bodies interred therein, and to purchase or cause to be condemned, taken and appropriated for street purposes the part of said cemetery so taken. Sp. Laws 1891, c. 129, approved April 11, 1891. This law provided that the bodies of deceased persons removed should be properly buried within the remaining portions of said cemetery, in lots similar in size and character to those from which said bodies were removed, giving, however, the right to relatives of such deceased persons to remove the bodies of said deceased persons to some other cemetery, and the names of all deceased persons whose bodies were so removed from said portion of said cemetery, when known, and the place to which said bodies were removed should be entered on a record book, which book was to be filed in the office of the city clerk of the city of Minneapolis.

That the proceedings for the condemnation of any portion of said cemetery grounds under said law are the same as are provided by law for taking private property for like purposes, except as modified by the act. Pursuant to said law, the city of Minneapolis did appropriate and take for street purposes the portion of said Maple Hill Cemetery described in the law, which portion so taken included the premises hereinbefore described, which belonged to plaintiff, and in which said children were interred.

That at a regular and duly-called meeting of the city council of the city of Minneapolis, on June 29, 1894, a member of said city council moved that the city engineer of the city of Minneapolis be, and is hereby, directed to remove in such manner, and to such points as he may deem best, from the portions of Maple Hill Cemetery taken or required by the city for street purposes, all bodies interred therein, the expenses of such removal to be paid out of the permanent improvement fund, which motion was duly carried.

That thereafter, to wit, on November 19, A. D. 1894, said de-

fendants, and each of them, entered upon the said burial lot, and removed therefrom the bodies of each of the said children so interred therein, but that they carelessly and negligently failed properly to bury said bodies within the remaining portions of said cemetery, in a lot similar in size or character to the said burial lot; that, upon the said removal of said bodies, said defendants, and each of them, improperly, negligently and carelessly buried the said bodies in one grave, in some place to plaintiff unknown, within the city cemetery, in the said city of Minneapolis. This plaintiff had no notice, knowledge or information of the said taking of his said lot, and never received any compensation therefor, and had no knowledge or information of the removal of said bodies until long after such removal. That, by reason of the facts hereinbefore stated, plaintiff's feelings were greatly wounded, and he has suffered great grief and mental pain and anguish, to his damage, as he alleges, in the sum of \$2,000.

The foregoing statement is substantially what constitutes the first cause of plaintiff's action, as alleged in his complaint, to which the city of Minneapolis and defendant F. W. Cappelen demurred separately, upon the ground that sufficient facts were not stated to constitute a cause of action.

The second cause of action is alleged to be as follows:

"Plaintiff repeats and realleges all of the allegations contained in his first cause of action herein, and makes the same part hereof.

"(2) That thereafter, and under and pursuant to said law, said defendant city of Minneapolis undertook to condemn the lands described therein, and including the said premises of plaintiff; that said condemnation proceedings were, on their face, due and regular in manner and form; that thereafter, to wit: on the 1st day of November, 1894, said defendants, pursuant to said law and condemnation proceedings, and without the knowledge or consent of plaintiff, entered upon and took possession of said described premises, and all thereof, and opened and constructed, and have ever since maintained thereon, a public street, and kept the exclusive possession thereof.

"(3) That, by reason of the facts hereinbefore alleged, said premises were of special value to this plaintiff, and were of the value of \$2,000."

"(6) That, by reason of the premises, this plaintiff has been damaged in the sum of \$2,000."

Each of the above defendants interposed separate demurrers to the second cause of action, viz., that neither cause stated sufficient facts to constitute a cause of action. All of the demurrers were overruled by the court, and the defendants appeal.

An examination of the second alleged cause of action first seems the most appropriate and desirable. In doing this, we assume that the special law of 1891 (chapter 129) is unconstitutional, as the legislature was then prohibited from enacting special laws for the purpose of laying out, opening or altering highways. Const. art. 4, § 33. The acts complained of were done subsequent to the passage of the special law of 1891 above referred to; and, though done by virtue of its apparent authority, yet, as that law was unconstitutional, the acts of the defendant were unlawful, in view of Sp. Laws 1881, c. 76, subc. 8, § 10 (p. 462), which provides that

"Nothing in this section shall be construed as permitting the condemnation of any ground of any cemetery or burial place and occupied for such purposes, without the consent of the owners of such ground."

The defendant city would have the power to make such condemnation with the consent of the owner of such ground, and hence the right of condemnation is within the general scope of its corporate power as prescribed by its charter. To be *ultra vires* in the sense that it is not within the power or authority of the corporation, it must not have power to act in reference to the matter under any circumstances. *Boye v. City of Albert Lea*, 74 Minn. 230; 2 Dillon, Mun. Corp. (2d Ed.) § 968.

The only circumstance in this case which prevented the city from having power to lay out a street was the want of consent of the owner of the property; but this could not destroy the general corporate power of the city over the subject-matter. It had such general power, and the only thing to stay its exercise was want of consent of the owner of the property. His consent had nothing to do in creating the power, but only extended its exercise to his particular property. Having this general power, it proceeded to exercise it in an unauthorized and unlawful manner, for which we think that both demurring defendants are liable; not, of course,

for the value of the land attempted to be taken for damages, but for the trespass. *Crossett v. City*, 28 Wis. 420.

By their demurrer, they admit that the city undertook to condemn said land, claiming that they had apparent authority therefor, that their proceedings were regular on their face, that the city entered upon and took possession of said premises, and all thereof, and opened and constructed, and have ever since maintained thereon, a public street, and kept the exclusive possession thereof.

The admitted facts do not constitute it merely a trespasser by and through some of its officers, where the acts were wholly and manifestly outside of its charter and the scope of its provisions and corporate power, and where there was no adoption or ratifying act, and no retaining the benefits thereof with intent so to do perpetually. The corporation itself, vested with jurisdiction to act, admits that it has taken the property, and is using it for its public purposes, and affirms all the tortious acts in this respect of its officials; and it cannot now be allowed to shirk the responsibility for its tortious and injurious acts which it has perpetrated upon the property of others within its own limits, and say that the owner is without the means of redress.

It is well, however, to bear in mind that there is a distinction between actions arising on contract made by municipal corporations in excess of their powers, which are strictly speaking *ultra vires*, and actions against a corporation for injuries caused by tortious acts done by its agents in the course of its business, and of their employment in its powers.

This distinction is pointed out in *Salt Lake City v. Hollister*, 118 U. S. 256, 6 Sup. Ct. 1055, where, at page 263, it is said:

"It remains to be observed that the question of the liability of corporations on contracts which the law does not authorize them to make, and which are wholly beyond the scope of their powers, is governed by a different principle. Here the party dealing with the corporation is under no obligation to enter into the contract. No force or restraint or fraud is practiced on him. The powers of these corporations are matters of public law, open to his examination; and he may and must judge for himself as to the power of the corporation to bind itself by the proposed agreement. It

is to this class of cases that most of the authorities cited by appellants belong,—cases where corporations have been sued on contracts which they have successfully resisted, because they were *ultra vires*. But even in this class of cases the courts have gone a long way to enable parties who had parted with property or money on the faith of such contracts to obtain justice by recovery of the property or the money specifically, or as money had and received to plaintiff's use. *Thomas v. Railroad Co.*, 101 U. S. 71; *Louisiana v. Wood*, 102 U. S. 294; *Chapman v. County of Douglas*, 107 U. S. 348, 355."

It was also further said, at page 260, by the same court:

"The truth is that, with the great increase in corporations in very recent times, and in their extension to nearly all the business transactions of life, it has been found necessary to hold them responsible for acts not strictly within their corporate powers, but done in their corporate name, and by corporation officers who were competent to exercise all the corporate powers. When such acts are not founded on contract, but are arbitrary exercises of power in the nature of torts, or are quasi criminal, the corporation may be held to a pecuniary responsibility for them to the party injured."

Dillon, in his work on *Municipal Corporations* (volume 2, § 971), after discussing the doctrine as laid down in several cases, says:

"Cases such as those just mentioned are to be distinguished from others which resemble them in the circumstance of relating to wrongful acts, but which arise out of matters or transactions within the general powers of the corporation, and in respect of which there may be a corporate liability. Thus, if, in exercising its power to open or improve streets, or to make drains and sewers, the agents or officers of a municipal corporation, under its authority or direction, commit a trespass upon, or take possession of, private property, without complying with the charter or statute, the corporation is liable in damages therefor."

It is to be observed in this case that the plaintiff entered into no contract with the city, and never knew of, and never in any manner consented to, its tortious acts, when his children were taken from his burial lot, and all buried by the city in one grave, and in a place to the plaintiff unknown. In view of the facts in this case and the law, the liability of the city is undoubted, as well as that of the defendant Cappelen, who assisted and took part with and in behalf of the city in these tortious acts.

The plaintiff has deemed it proper to divide the allegations in his complaint, and in form alleged two causes of action; but the transactions complained of were authorized to be, and were, done at the same time, in pursuance of one corporate purpose, and as one transaction, under the same apparent authority, and for the benefit of the city, and by it so intended. We are therefore of the opinion that, whether we regard the complaint as containing one or two causes of action, the rule of law herein stated is applicable, and hence each demurrer was properly overruled.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur in the foregoing opinion. The city had authority to condemn land in this cemetery with the consent of the owner; that is, the city had a right to buy this land of the owner, and submit the question of price to arbitration.

If A. has authority to buy a horse, does that give him authority to steal one or take one by force? If the city had authority to buy land in a cemetery, did this give it authority, or even color of authority, to take it by force, and without the consent of the owner? Most certainly not. True, in *Boye v. City of Albert Lea*, 74 Minn. 230, 76 N. W. 1131, we held that a municipal corporation is liable for the tortious act of its officers, unless the act is, as said at page 233,

“Ultra vires, in the sense that it is not within the power or authority of the corporation to act in reference to it under any circumstances.”

“Any circumstances,” as here used, means circumstances which it is in the power of the municipality of its own volition to create or control, not circumstances which are wholly within the control of the opposite or injured party, and wholly without the control of the municipality. In other words, the meaning is that if it is in the power of the municipality, by complying with its statutory powers, to do the act complained of, it is liable for the wrongful act of its officers in doing the same thing, without complying with such statutory powers.

In my opinion, the acts here in question of the officers of the

city were wholly without the scope of its powers. The majority seem to confuse the doctrine of when a private corporation is liable for the ultra vires acts of its officers, or may ratify those acts, with the doctrine of when a municipal corporation is liable for the ultra vires acts of its officers, or may ratify those acts.

Again, plaintiff, by the second cause of action, proposes to recover from the city, not damages for the trespass committed on the land, but the value of that land. If the majority intend to permit a recovery on this theory, they have, indeed, adopted a brand-new principle of law, as applied to real estate. They, in effect, allow the injured party to waive the tort, and sue on contract for the value of the real estate trespassed upon.

STATE v. JOHN BERNDGEN.

December 20, 1898.

Nos. 11,335—(16).

Larceny—Verdict Sustained by Evidence.

Evidence considered, and *held* sufficient to sustain the finding of the jury that the defendant was guilty of the crime of larceny.

Defendant was convicted in the district court for Hennepin county of grand larceny in the second degree, and sentenced, McGee, J., to imprisonment in the State Reformatory at St. Cloud. From the judgment, defendant appealed. Affirmed.

Frank M. Nye, for appellant.

H. W. Childs, Attorney General, *Jas. A. Peterson*, County Attorney, and *C. W. Somerby*, Assistant County Attorney, for respondent.

START, C. J.

The defendant was convicted in the district court of the county of Hennepin of the crime of grand larceny in the second degree. He made a motion for a new trial, which was denied, and he was, by the judgment of the court, sentenced to imprisonment in the state reformatory. He appealed from the judgment.

The principal question presented by the record for our consideration is whether the evidence is sufficient to sustain the verdict of guilty. The defendant and Orle Wales were charged with having stolen from a warehouse, located some 23 miles from the city of Minneapolis, at a station on the railway known as "Rogers," 18 bushels of rye, on the night of April 11, 1898.

The evidence to establish the fact that the larceny was committed by one or more persons is clearly sufficient, but as to the defendant's connection with the larceny it is less satisfactory.

The testimony on the part of the state tended to show that on the evening of the larceny a farmer who lived three-fourths of a mile from the station where the warehouse was located saw two men who were riding in a farm wagon, with a wood-colored box, to which were attached a pair of horses. They stopped, and inquired of him how far it was to Dayton. They also made some inquiries as to Rogers, and drove on towards Dayton in the opposite direction from Rogers. There was no identification of the defendant or of Wales as one of these men. In the forenoon of the next day the defendant and Wales were arrested while driving over Plymouth avenue bridge, in the city of Minneapolis, in a farm wagon, with a faded wood box, drawn by a pair of horses. In the wagon there were 10 sacks of rye, estimated at about 2 bushels to a sack. The officers making the arrest inquired of them where they got the rye, and they would not answer. The defendant was driving the team when they were arrested. He afterwards made a statement to one of the officers to the effect that Wales was to blame for getting him into trouble.

There was evidence on the part of the defendant tending to show that he was in Minneapolis during the afternoon and evening of the day the larceny was committed.

The defendant was a witness in his own behalf, and denied that he had anything to do with the larceny, or knew anything about it. He testified that Wales was driving along the street with the wagon, and invited him to ride with him; that he accepted his invitation, and that shortly before the arrest Wales asked him to drive while he rolled a cigarette; that he did not tell the officer that Wales was to blame for getting him into the trouble, but that

he did tell him that he had never been arrested for anything of the kind before. He admitted that he had been previously arrested, but did not state what for. There was no evidence as to where the rye found in the possession of the defendant and Wales came from.

Whether the jury were justified in convicting the defendant on this evidence depends largely upon the question whether they were satisfied with his explanation as to how he and Wales came to be in possession of the same kind of grain, and substantially the same quantity, as was stolen the evening before, and why he did not explain where he got it, or his connection with it, when the officers made the inquiry as to this matter.

The evidence on the part of the state made a case which fairly required the defendant to make the explanation. It was for the jury, who had an opportunity to observe the manner of the defendant when giving his testimony, and to determine his credibility, to say whether, in view of his explanation, the evidence was sufficient to satisfy them beyond a reasonable doubt of his guilt. Their finding was against the defendant, which was approved by the trial court, and we cannot disturb it.

In disposing of the defendant's motion to dismiss, the trial court referred to the evidence, and particularly as to the similarity of the wagon in possession of the two men on the evening of the larceny, near Rogers, with the one in possession of the defendant and Wales the next forenoon, to which the defendant excepted, whereupon the court said there is proof that they were in a wagon, on the bridge, which had an unpainted box, and further:

"That is all the court means to state. I don't undertake to say that it was the same wagon, but I do say that it is a question for the jury."

This is assigned as error. We are of the opinion that it was not. Judgment affirmed.

JOHN H. DOWNES v. ST. PAUL CITY RAILWAY COMPANY.

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December 20, 1898.

Nos. 11,895—(173).

Street Railway—Personal Injury—Contributory Negligence—Verdict.

Action for personal injuries. Evidence considered, and *held*, that the trial court correctly directed a verdict for the defendant on the ground that the person injured was guilty of contributory negligence.

From an order of the district court for Ramsey county, Otis, J., denying plaintiff's motion for a new trial, after directing a verdict for defendant, plaintiff appealed. Affirmed.

O. H. O'Neill, for appellant.

Munn & Thygeson, for respondent.

START. C. J.

The plaintiff brought this action, on behalf of his minor son, to recover for personal injuries sustained by him in a collision with one of the defendant's electric cars.

At the close of the evidence the trial court directed the jury to return a verdict for the defendant, on the ground that no negligence had been shown on the part of the defendant, and, further, that the uncontradicted evidence showed, as a matter of law, that the boy was guilty of contributory negligence.

The plaintiff appealed from an order denying his motion for a new trial.

The plaintiff here claims that the defendant had no authority or license to operate electric cars at the place where the collision occurred, and that in so operating them there it "was guilty of maintaining a common nuisance, and therefore responsible, irrespective of any negligence upon its part, to whomsoever it injured thereby, unless such person was guilty of negligence which contributed to or caused the injury." In view of this concession that negligence on the part of the person injured would be a defense even if the defendant were at the time operating its electric cars without authority, it is unnecessary to determine whether it had such authority, or, if so, whether it would be responsible to any

person injured by its cars, irrespective of its negligence in the premises; for we are of the opinion that the trial court correctly directed a verdict in this case on the ground of the boy's contributory negligence.

The undisputed evidence upon this question establishes these facts: On the date of the accident, and for some time prior thereto, the defendant had a power house and car barn at the southeast corner of Dale street and Selby avenue, in the city of St. Paul, fronting 200 feet on the avenue, with a stone sidewalk 11 feet wide along the entire front of the building. There were two doors, each about 13 feet in width, opening upon the sidewalk. Switch tracks were laid from the defendant's main tracks on the avenue across the sidewalk through each of the doorways into the building. The defendant was accustomed to run its cars in and out of the building along the switch tracks across the sidewalk.

Electricity was the motive power which moved the car by which the boy was injured. He was at this time 16 years old, and his testimony indicates that he was a bright boy. He had been employed in a drug store one block west from the power house for eight months prior to the accident, during which time he passed the building very often. He knew the doors and tracks were there, and that the cars were going in and out of the building very often, and that a car was liable to come out at any time. At about 10 o'clock in the forenoon of August 30, 1897, he went on an errand to a drug store located on the avenue east of the power house; and on his return, as he was trotting or running along the sidewalk in front of the power house, and about 2 feet therefrom, a car came out through the easterly doorway and struck him. He did not see or notice the car until he was hit. The front of the car stood, when it was started out, about 1 foot inside of the door. It moved out slowly, not as fast as the motorman could walk, and did not go more than 4 feet before the boy was struck, nor more than 7 feet in all before it was stopped. It was some 7 feet wide and 14 feet high.

There can be but one inference reasonably drawn from these facts, and that is that, if the boy had exercised any care in passing the doorway through which the car came, he would not have been injured. He was bound to exercise ordinary care. It may be con-

ceded that he was not, as a matter of law, bound to stop and look through the doorway before crossing the tracks; but it was negligence for him to heedlessly trot along in front of the opening, and only 2 feet therefrom, without doing anything to ascertain whether a car was coming out,—knowing that one might come out at any moment. It is apparent that the slightest attention on his part—even turning his head and looking towards the doorway—would have enabled him to have avoided injury. It could not have been otherwise, in view of the size of the car, the slowness of its movement, and the fact that it had moved only 4 feet when the collision occurred. He was guilty of contributory negligence.

Order affirmed.

TIMOTHY DONAHUE v. LIVINGSTON QUACKENBUSH.

December 20, 1898.

Nos. 11,406—(157).

Limited Divorce—Receiver—Sale Below Value to Surety on His Bond.

The plaintiff's wife secured a limited divorce from him, and obtained judgment for permanent alimony, which he neglected to pay, whereupon the court appointed D. as receiver of all the plaintiff's personal property and ordered him to take, collect, recover and sequester all the rents, issues and profits of plaintiff's land, and dispose of all of his personal estate, which he did. A judgment existed against plaintiff, which, with a certain mortgage, was a lien on his land. The defendant, Q., purchased the judgment, and caused execution thereon to be issued; and by virtue thereof the land was sold to D., the receiver, and the latter then sold the land to Q. for a sum far below its actual value. *Held*, that D. had no lawful authority to so dispose of said land while acting in such fiduciary capacity as receiver.

Same—Knowledge of Purchaser—Good Faith—Trust.

The grantee, Q., was one of the sureties on the bond of D. as receiver, and knew all the facts of the entire transaction. *Held*, that he stood in the place of D., and that he was not a purchaser of the land in good faith, and that it was still affected with the trust for the benefit of the plaintiff.

Action in the district court for Le Sueur county. The cause was tried before Quinn, J., who ordered judgment for defendant. From the judgment entered in accordance therewith, plaintiff appealed. Reversed.

Pfau & Pfau and *Charles C. Kolars*, for appellant.

H. J. Peck and *Thomas Hessian*, for respondent.

BUCK, J.

On April 30, 1886, plaintiff owned 178 acres of land in Le Sueur county, 80 acres of which was his homestead. On April 30, 1886, his wife, Dorothea Donahue, obtained a judgment of limited divorce against him, whereby they were separated from bed and board; and plaintiff was ordered to pay said wife the sum of \$300 per annum alimony, to be computed from April 21, 1886, and to be paid in monthly instalments at the end of each month,—the plaintiff to have the use of the house and lots in the village of Ottawa, in said county. He was also ordered to pay plaintiff unpaid temporary alimony amounting to \$42, and \$4.24 costs, all of which several sums were made a specific lien upon all of the said 178 acres.

Donahue did not pay said several sums, and one August R. Doescher was appointed receiver of the property of said Donahue, and ordered to immediately sequester Donahue's said real estate, and enter thereon, and take, collect, recover and sequester all the rents, issues and profits of said lands, and all his goods, chattels, and personal estate, whatsoever, and to rent said land, and collect the rent thereof, and to sell and dispose of the personal estate of said Donahue, and pay the same in the manner in said order directed. The order further provided that Doescher, before entering upon the discharge of his duties, should execute a bond such as is usually required in a case of that kind. This was done, and one of the sureties upon said bond was the defendant, Livingston Quackenbush.

On October 5, 1886, one Harvey obtained a judgment against Donahue for \$234.20, which was duly docketed in the office of the clerk of the district court of Le Sueur county, which judgment Harvey assigned to this defendant for value; and, by virtue of an execution caused to be issued thereon by defendant, the sheriff of Le Sueur county levied upon and sold said land of Donahue, save his

homestead of 80 acres. At said execution sale made July 11, 1887, the said receiver, August R. Doescher, purchased the same in his own name for the sum of \$302.22, and received the sheriff's certificate of such sale.

Subsequently, and on February 10, 1890, Doescher and his wife sold the said land, by quitclaim deed, to this defendant, Livingston Quackenbush; the consideration stated in said deed being \$350. This was the amount paid to Doescher by the defendant, but the latter at the same time paid a mortgage on said premises, and paid Mrs. Donahue for a quitclaim deed of said premises a certain sum of money, which in all amounted to \$1,500, and which constituted the consideration for the property so purchased by him, and which the court found was then of the value of \$2,500. Defendant testified that he thought the premises then worth \$2,000. On February 12, 1886, Donahue and his wife executed to one Roach a mortgage upon the premises here in controversy for \$130, for the purpose of obtaining money with which to pay temporary alimony pursuant to an order of the court previously made in said cause, which mortgage the trial court found remained a lien upon said premises at the time of said execution sale to Doescher.

The principal question in this case is, was defendant, Quackenbush, a purchaser in good faith of said premises? Upon this question the trial court found in the affirmative.

This case was once before in this court (62 Minn. 132, 64 N. W. 141), and it was there said, at page 134,

"Doescher, as receiver, while not strictly a trustee of the land purchased by him at execution sale, because the legal title thereto was not vested in him as receiver, yet occupied a fiduciary relation to it, and was bound to act in perfect good faith, and the equitable doctrine of trusts was applicable to him. The duties, obligations and disabilities of a trustee were imposed upon him by his appointment as receiver and the taking possession of all of the plaintiff's property as such. Pomeroy, Eq. Jur. §§ 157, 1366. As such quasi trustee he was bound to protect the trust property in every reasonable manner. He was not bound to advance his own money to discharge the lien of the judgment, but, having voluntarily purchased the property at the execution sale, he could not profit by it, and whatever title he acquired to the land by the sale to him he held in trust for the plaintiff, subject to the purposes for which the receiver was appointed and his equitable claim to be reimbursed for the

amount, including interest, advanced by him to protect the property by purchasing it at such sale."

Even if Doescher purchased the premises in good faith, to save them from being sacrificed, because he could not find other purchasers or parties who would pay off the liens on the premises, still it was his duty to have retained the property as such receiver, and accounted for it to the court, or, if sold under the direction of the court, to have accounted for the proceeds received, and not to profit by such sale. But this he did not do. It does not appear that he ever made any account of this proceeding, or any other business which he carried on or participated in as receiver, but, instead of doing so, he sold the property, and in 1891 removed to another state, beyond the jurisdiction of the court appointing him receiver, and so remains.

So far, he has been guilty of a gross breach of trust, and his evidence corroborates his acts in this respect. He testified that he sold the premises to defendant, and indirectly received \$1,500 therefor, viz. the defendant to return Doescher's note, pay the Roach mortgage, and what was left of the \$1,500 to be paid to Mrs. Donahue, which was done. He also testified that, if he could have sold the premises for more than \$1,500, he should have kept the surplus himself. This, as receiver, he would have had no legal right to do; and his acts and his own evidence show that he was not acting legally or in good faith, especially when he sold to Quackenbush, but that one of his objects in doing so was for the purpose of benefiting himself out of Donahue's property.

Nor had he any authority to make a bargain with defendant that, on the sale of Donahue's property, a large portion of the proceeds should be paid to Donahue's wife. The court had before that time fixed by its own order the amount of alimony to which she was entitled out of Donahue's property, and it is not claimed that this was any part of the amount so fixed by the order of the court. It was an arbitrary amount agreed upon by Doescher and Quackenbush. As he could not as receiver make profit out of the sale to himself of Donahue's property, it follows that he could not confer any such right upon Quackenbush; and hence the latter stands in the shoes

of Doescher, unless he is an innocent purchaser, as he testified on the trial.

But this testimony must be viewed and determined in the light of all the facts and attending circumstances of the case. As one of the sureties on Doescher's bond as receiver of the property of Donahue, he must be deemed to have had notice of the contents of the bond, which, of course, stated the receiver's duties and obligations. The rule is that, where the notice by which a party is sought to be affected is traced through an instrument executed by himself, it matters not whether such instrument constituted a necessary link in his chain of title; he will be conclusively presumed to have full knowledge of its contents, except where his signature has been obtained by fraud and deceit. Wade, Notice, § 43.

Knowing the contents of the bond, Quackenbush knew the duty and obligations of Doescher as such receiver. One of these duties was to protect such trust property by all fair and reasonable means. It is true that he may have bought the property at execution sale with a view to reimburse himself for his outlay on the Harvey judgment, but his own testimony shows that he also bought it for the benefit of the Donahue estate. This property was then worth \$2,500, and, even if it were true that the purchase price of \$1,500 was appropriated to a legitimate purpose, it sold for \$1,000 less than its actual value.

If the payment to Mrs. Donahue was unauthorized so far as the receiver and Quackenbush were concerned, then the property was sold for about one-fifth of its actual value; and, even if it had brought more than \$1,500, Doescher intended to appropriate the surplus to his own use and benefit. In any event, as the sale stood, the plaintiff must lose \$1,000 of his estate, if it and the judgment herein are upheld; and this, too, through the act of the receiver, whose duty it was, in his fiduciary capacity, to save the estate, so far as possible, for Donahue. Investing his own money to protect the estate did not permit him to sacrifice it, or profit by his own acts, to the detriment of the estate of which he was the trustee.

Quackenbush had notice of all the facts which constituted Doescher a trustee for himself. He testified voluntarily that at the time he purchased the premises he took steps for the purpose of

ascertaining the validity of the title. If he did this, it is self-evident that all matters connected with the records and proceedings were examined by him, and that he had full notice thereof. But, knowing all the proceedings and contents of the records, if he relied upon them and acted accordingly, he did so at his own peril. His belief, or reliance on the advice of others, that he could safely purchase, did not authorize him to do so, if the law, as applied to the facts, forbade it. Ignorance or mistake of the law applicable to these facts would not render him a purchaser without notice of the trust. He purchased through a receiver, who, under the circumstances, had no lawful right to sell the estate of his cestui que trust, and especially for a sum far less than its real value. He knew that a large part of the purchase money was to be paid, not to the receiver for the benefit of the estate, but to Mrs. Donahue for her own benefit; and hence he must be held to have joined with the receiver in diverting the proceeds of the sale from going to the benefit of Donahue after paying the just and lawful claims on the property, but now seeks to retain a large interest in the property over and above what he paid as the purchase price of the land.

Under all the facts in the case, we are of the opinion that it was reversible error for the trial court to hold that the defendant was a purchaser of the property in good faith.

Upon the oral argument, plaintiff's counsel conceded that the defendant was entitled to reimbursement for such sums as he had properly paid out at the time of the sale and purchase of the property, such as the amount of the judgment, and the Roach mortgage, which payment operated for the benefit of the plaintiff. The evidence shows that defendant had also paid out various sums for taxes, and during several years had received the rents of the land. The receiver, Doescher, never having made a final accounting of his acts as receiver, is subject to be called upon to do so; and the defendant, Quackenbush, in a proper proceeding, is entitled to have his account adjusted.

The judgment appealed from is reversed, and a new trial granted.

ELLA M. BAILEY v. CHARLES F. ANDERSON and Others.

December 20, 1898.

Nos. 11,414—(177).

Satisfaction of Mortgage—Action to Cancel—Finding of Payment Sustained by Evidence.

This is an action to cancel a release of a mortgage on the ground that it and the mortgage were delivered to the mortgagor without payment of the mortgage, and to foreclose the mortgage. *Held*, that a finding of the trial court to the effect that the mortgagor paid the mortgage in full to the agents of the mortgagee, who were then authorized to receive payment thereof for her, is sustained by the evidence.

Action in the district court for Carver county to cancel a satisfaction of mortgage, and the record thereof, and to foreclose the mortgage. The cause was tried before Cadwell, J., who ordered judgment in favor of defendants. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

Bodge & Gould, for appellant.

W. C. Odell and *Hahn, Belden & Hawley*, for respondents.

START, C. J.

The appellant, on December 10, 1888, then and still a resident of Montpelier, Vermont, through A. F. & L. E. Kelley, of Minneapolis, made a loan of \$1,500 to the respondent Charles F. Anderson, for which he and his wife made their promissory note to the appellant, and executed to her a mortgage on their farm in the county of Carver, this state, to secure its payment in five years, with interest. This note and mortgage, at some time after they became due, were delivered by A. F. & L. E. Kelley to Anderson as paid, and a release of the mortgage, duly executed by the appellant, was also delivered by them to Anderson, which was duly recorded in the office of the register of deeds of the proper county. Whether the note and mortgage were received from the appellant by the Kelleys before or at the same time that they received the release was a disputed and material question on the trial of this case.

The appellant brought this action to cancel the release and to

foreclose the mortgage on the ground that the note and mortgage had never been paid, but that, with the release, they were delivered to the mortgagors by the Kelleys by fraud or mistake.

The answer of the mortgagors alleged payment in full of the mortgage debt to the Kelleys, and that thereupon the release was duly and rightfully delivered to them.

Upon the issue of payment and the agency of the Kelleys in the premises the trial court made the following finding:

"That on or prior to the 4th day of January, 1894, the defendants, Charles F. Anderson and Caroline Anderson, fully paid the said note and mortgage to A. F. & L. E. Kelley, of Minneapolis, who were then and there the agents of the plaintiff, duly authorized and empowered to receive payment thereof; and thereupon the plaintiff, on the said 4th day of January, A. D. 1894, duly executed a release of said mortgage, which was duly recorded in the office of the register of deeds of said Carver county, as alleged in the pleadings."

As a conclusion of law, the court found that the defendants were entitled to judgment adjudging the mortgage to be fully paid and satisfied. The appellant appealed from an order denying her motion for a new trial.

1. It was claimed by the respondents on the trial that the mortgage was paid in full to the Kelleys as the agents of the appellant after its maturity, and in the month of December, 1893. The appellant claimed that no such payment was made, but, if it was, the Kelleys were not authorized by her to receive it. She, however, substantially concedes that, if the note and mortgage were in the possession of the Kelleys at the time of the alleged payment, they were authorized to receive payment thereof as her agents; but she insists that they were not sent to the Kelleys until on or about January 4, 1894, when she sent them for collection, with a release of the mortgage. That it was her intention to make the Kelleys her agents to collect the note and mortgage whenever she forwarded them for collection, and that she did so send them forward, and that they were received by the Kelleys, and delivered by them to the mortgagors, are admitted facts in the case. But her contention is that, because the note and mortgage were not forwarded, as she claims, to her agents, until after the alleged payment was made to them, they had no authority to then receive the payment for her.

Assuming, for the present, that the payment was in fact made to the Kelleys as claimed by the respondents, the first question for our decision is, did the Kelleys have authority to receive, at the time it was made, payment of the mortgage? The trial court found as a fact that they had. This necessarily includes a finding to the effect that the note and mortgage were then in the possession of the Kelleys for collection, if the further claim of the appellant is correct that it appears from the undisputed evidence that they had no authority to receive the payment for her until they had the note and mortgage in their possession for collection.

The respondents urge that the evidence shows not only that the Kelleys then had the note and mortgage, but, were it otherwise, they were authorized to receive the payment. We have no occasion to inquire as to the general authority of the Kelleys in the premises, for, after a careful examination of the evidence, we are of the opinion that it sustains the finding that the note and mortgage were in the possession of the Kelleys for collection before the alleged payment was made to them. The evidence was not such as to require the trial court to so find, and it is certain that, if it had found to the contrary, the evidence would sustain the finding. But the evidence on this issue is far from being conclusive in her favor. We accordingly hold that the finding to the effect that the Kelleys were authorized to receive payment of the mortgage for the appellant at the time it was made is sustained by the evidence.

2. The appellant further contends that the evidence was not sufficient to sustain the finding that the mortgage was in fact ever paid to the Kelleys. The evidence on this question was sufficient to establish these facts: The mortgage matured December 10, 1893, and the mortgagor Anderson was notified by the Kelleys some time prior to that date that his mortgage could not be extended, and must be paid. He accordingly applied to the Kelleys, through their local agent, Mr. Du Toit, to secure for him a new loan with which to pay appellant's mortgage. The Kelleys, for him, applied to the respondent Post for such loan, who accepted it on December 9. Thereupon Anderson and wife executed a mortgage on their farm to Post for \$1,500, which was sent to the Kelleys December 19, and forwarded by them to Post on December 20. On the same

day the Kelleys charged Post on their books the amount of the loan, \$1,500, and credited the appellant the amount of her mortgage, \$1,500. No other entries of this particular transaction were ever made in their books. Post sent the money to cover the Anderson loan and others, by mail, December 20, to the Kelleys, by a draft of \$5,000, payable to their order. They received the draft December 23, and immediately deposited it in bank with their own funds.

The Kelleys were the agents of Anderson to procure a loan for him with which to pay appellant's mortgage, and to receive the money on such loan. When the money was received by them on the Post mortgage, they were also the agents of the appellant to receive payment of her mortgage. They received a release of her mortgage from her some time after January 4, 1894, and delivered it to Anderson. Whether they had previously delivered the note and mortgage to him, or delivered them with the release, is not entirely clear from the evidence. The Kelleys never paid the money received by them to pay appellant's mortgage to her, and they are now insolvent. The inference which may fairly be drawn from these facts is that Anderson paid his mortgage to the appellant's agents on December 23, when they received the money from Post.

The counsel for the appellant, however, urge that, because the Kelleys made the book entries three days before they actually received the money, there was never any appropriation of the money to the payment of the mortgage, and that when they deposited it in the bank to their own credit they converted it to their own use, and thereby became Anderson's debtors to the amount thereof. This question of payment does not depend wholly on the entries which the Kelleys made in their books, for, if none had ever been made, the evidence would justify the conclusion that the payment was made. When the Kelleys sent the new mortgage to Post on December 20, they entered the transaction on their books as a completed one, evidently assuming that Post would at once forward the money. This was a premature entry, but it is evidence of their intention to appropriate the proceeds of the Post loan to the payment of the appellant's mortgage. When, therefore, they received the money, three days after, there was no necessity to repeat the book entries, for their books then truly showed the exact transac-

tion. They so treated the entries, for they made no other or further entry as to the transaction after the money was received, and from the date of the actual receipt of the money the book entries, with the fact that they made no others after actually receiving the money, became effective as evidence tending to show an appropriation of the money for the loan to Post to the payment of appellant's mortgage at the time they received the money.

When the Kelleys received the money for Post with which to pay appellant's mortgage they not only received it for Anderson, but they at the same time received it for the appellant, for thereby the money intended to be a payment of the mortgage came to the hands of her agents for that purpose. This was followed by a surrender of the note and mortgage as paid and delivery of the satisfaction of the mortgage. The evidence is sufficient to sustain the finding of the trial court that the appellant's mortgage was in fact paid.

Order affirmed.

WILLIAM JONES and Others v. HENRY JONES and Others.

December 21, 1898.

Nos. 11,264—(158).

**Surviving Spouse—Election to Take under Will—G. S. 1894, § 4472—
Homestead.**

Where the six-months period fixed in G. S. 1894, § 4472, has expired, in a case in which the provisions of that section are applicable, and a surviving husband or wife has not exercised his or her right to renounce and refuse to accept the terms and conditions of the will, an election has been made by such survivor to take under the will, and the right of renunciation and refusal no longer exists. A failure to exercise this right within six months after the will has been probated has the same legal effect upon the estate, including the statutory homestead, if there be one, as the written assent of the survivor to the will itself, provided for and required by the terms of section 4470, would have.

**Same—Devise of Homestead to One Child—Children Surviving Both
Parents.**

In a case where the testator held a statutory homestead at the time

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of his decease, and the surviving wife, for whom provision was made in the will, lived for more than two years after the expiration of the six-months period, heretofore mentioned, without exercising her option as to such will, children who survive both parents have no interest in the homestead, devised to another person.

Four children of John P. Jones, deceased, petitioned the probate court for the county of Blue Earth to set apart to them, and to Henry Jones, certain lands as the homestead of said deceased. The petition was granted, Torrey, J., and Henry Jones appealed to the district court for that county from the order granting the petition. In the district court the matter was tried, upon stipulated facts, before Severance, J., who reversed the order of the probate court. From an order of the district court denying a new trial, petitioners appealed. Affirmed.

Lorin Cray, for appellants.

A surviving wife entitled to hold the homestead cannot be allowed to waive a claim to the homestead fixed by law, and take a part thereof, to the injury of other parties interested in the distribution of the decedent's estate. *Mintzer v. St. Paul Trust Co.*, 45 Minn. 323. The state, which confers the right and prescribes the rule of descent or distribution, may annex to the privilege which it confers such reasonable conditions to its enjoyment, as it may deem expedient. *In re Sherman's Estate*, 153 N. Y. 1. The power to dispose of the homestead by will must be subject to the homestead tenure of the survivor. *Eaton v. Robbins*, 29 Minn. 327. See to the same effect *Brettun v. Fox*, 100 Mass. 234; *Burroughs v. Nutting*, 105 Mass. 228. The homestead is to be set apart in pursuance of the statute in force at the time the order is made, and the interest therein which the widow and surviving child will take is to be determined by the same statute. *Sulzberger v. Sulzberger*, 50 Cal. 385; *In re Lahiff*, 86 Cal. 151; *In re Davis*, 69 Cal. 458; *Brettun v. Fox*, supra. A will speaks from the date of the death of the testator. *Graves v. Mitchell*, 90 Wis. 306; *Langley v. Langley*, 18 R. I. 618; *Cushing v. Aylwin*, 53 Mass. 169; *Shute v. Sargent*, 67 N. H. 305; *Bishop v. Bishop*, 4 Hill, 138; *Annable v. Patch*, 20 Mass. 360; *Pray v. Waterston*, 53 Mass. 262; *Schouler, Wills* (2d Ed.) § 11.

See also *Desesbats v. Berquier*, 1 Binney, 336; *Desnoyer v. Jordan*, 27 Minn. 295; *McCune v. House*, 8 Ohio, 144.

Wm. F. Hughes, for respondent.

There may be circumstances permitting a will to speak from the day of its execution. See *In re Swenson's Estate*, 55 Minn. 300. Statutes will not be construed retrospectively, unless, by their express terms or otherwise, such appears to be the manifest intent of the legislature. *Taylor v. Mitchell*, 57 Pa. St. 209; *Appeal of Lane*, 57 Conn. 182; *Brewster v. McCall*, 15 Conn. 274; *In re Tuller*, 79 Ill. 99. A will is construed according to the law in force at the time of its execution. *Packer v. Packer*, 179 Pa. St. 580; *Gable v. Daub*, 40 Pa. St. 217.

COLLINS, J.

We are again called upon to construe the provisions of G. S. 1894, § 4470. John P. Jones died testate, in 1889, the owner of a farm of 160 acres, of which 80 acres was his statutory homestead. His wife survived him, as did five children. The latter had attained their majority long prior to their father's decease. The will was duly probated in 1890, and, in accordance with its terms, one-half of all of the decedent's property was assigned and decreed unto the widow for the term of her natural life, with the remainder over to a son, Henry Jones; while the other half, except the sum of \$600, reserved for certain specified legacies to the other children, was assigned and set over to said son Henry absolutely. Another son (Hugh) was nominated in said will as executor, and he was duly appointed as such in 1890, and thereafter duly qualified, and has ever since been acting in that capacity.

The widow died in 1893. The estate has never been settled, and in 1894 the children, other than Henry, petitioned the probate court for the setting apart of the 80 acres, as the homestead of the deceased, to the five children before mentioned, and for their use. The petition was granted in the probate court, but on appeal the order was reversed by the district court.

On the facts this case does not materially differ from that of *Radl v. Radl*, 72 Minn. 81, 75 N. W. 111, and is governed by it. In each case there was the last will and testament of a husband, in which

provision was made for the wife, if she should survive the testator, in lieu of the statutory rights; and there were also children. In neither case did the wife assent to the provisions of the will during the lifetime of the husband. In each case the will was duly probated while the widow was living, and presumably she accepted its terms. In the Radl case the homestead was devised to a son in fee, free from all claims of the widow, and when the will was probated she executed, acknowledged and filed in the probate court her written assent to all of its terms and conditions, relinquishing all claims and rights in and to the estate, except as to the part devised to her. One or two years after this she brought an action against the son to eject him from the homestead, claiming that she could not lawfully assent to the terms of the will after her husband's decease.

In the present case an undivided half of all property, less the amount of certain legacies, and including the homestead, was bequeathed and devised to the son Henry, while the other half was bequeathed and devised to the widow during her natural life, with remainder over to Henry. The widow did not assent in writing to the terms and conditions of the will, but it was probated February 1, 1890. She lived until January 31, 1893, or for more than two years after the expiration of the six-months period fixed in section 4472, within which she was required by a written instrument, filed in the probate court, to renounce and refuse to accept the provisions of the will, or be deemed to have elected to take thereunder, and in accordance with its terms and conditions. She failed to file the instrument, and upon her death all of the children save Henry filed the petition just mentioned, claiming that it should be granted because their mother never formally assented to the testamentary disposition of the estate made by her husband.

What was said in the opinion filed in the Radl case in reference to a proper construction of sections 4470-4472, is pertinent here, and need not be repeated; and, changing the language a trifle, so that it may fit slightly different facts, the remainder of that opinion is in point. We have here the two essentials there mentioned: First, a testamentary disposition of the homestead; and, second, a failure on the part of the surviving wife to renounce, and a refusal

to accept, the terms and conditions of the will within the statutory period. This failure was an election on the widow's part to take under the will, and to accept its terms and conditions in lieu of the provisions made for her by statute. When the six months had expired, she having omitted to renounce and to refuse to accept under the will, her right of election terminated. It had gone; and certainly the children who survived her can have no greater rights than she had. They cannot revive this right.

We have the same argument here as in the Radl case,—that with this construction of the statute it is optional with the surviving husband or wife to deprive the children of their remainder in the homestead,—and the same reply can be made to it. The survivor has the power to deprive the children of this remainder by assenting to the will in writing, and it is of no importance to them how it is done, if this power absolutely exists. It is the act which affects them, and it is therefore immaterial whether it is performed by some affirmative action, like written assent, or is negatively brought about by reason of a failure to renounce and a refusal to accept under the will. The petitioners had no interest in the homestead to be set apart.

Order affirmed.

MITCHELL, J.

While I concur in the result arrived at, I do so upon an entirely different construction of G. S. 1894, § 4470, from that adopted in the opinion of the court. It will be observed that this case involves the interest of the children, and not of the widow, in the homestead of the testator. While I admit that, according to the grammatical relation to each other of the different provisions of this section, all that is contained in the first clause would seem to apply to all that follows in the four subdivisions, and therefore that the clause,

“Free from any testamentary devise or other disposition to which the surviving husband or wife shall not have assented in writing,”

Would be operative in favor of the children as well as the surviving spouse of the deceased, yet I think it is permissible to construe this clause as intended solely for the benefit and protection of the surviving spouse, and that, in view of the history and apparent pur-

pose of the statute, it ought to be so construed, although it may seem to do some violence to its grammatical structure.

If this clause was intended for the benefit of the children of the deceased, it is rather remarkable that, although they may be of full age, they are given no voice in the matter. Their assent to the disposition of the homestead by the deceased is not required. Their interest is wholly dependent upon the will of the surviving spouse, who may be merely a stepparent; and this interest they may lose by the mere failure of the surviving spouse to make an election under section 4472. Again, if the children should have protection against the testamentary or other disposition of the homestead of a parent, we do not see why they should have been given it when there is a surviving parent or stepparent, and not when both are dead.

Again, the clause is not limited to a testamentary disposition, but to any other not assented to in writing by the surviving spouse, and, if the clause referred to is to be held operative at all in favor of children, it must be held to be equally so as to such "other disposition," which is liable to lead to very embarrassing complications.

In the light of the pre-existing statutes on the subject, it seems evident to me that the authors of the probate code of 1889, in framing the section, had two objects in view,—one being to protect the statutory interest of a surviving spouse in the homestead of the deceased spouse against any disposition of it, testamentary or otherwise, to which the former had not assented in writing; and the other that the homestead should descend to the surviving spouse and children of the deceased, according to their respective interests, free from the debts of the deceased; that the first was designed for the benefit of the surviving spouse alone, while the latter was designed for the benefit of both the surviving spouse and children; and that the whole trouble has arisen from the fact that the commissioners who framed the code have attempted to effect both objects in a single section of the law of descents, which is very awkwardly and inaccurately constructed.

The construction of section 4470 which I suggest would render it entirely harmonious with the provisions of section 4472, and relieve the construction of both sections from difficulty; whereas,

if the court persists in the construction with which it has started out, I think it will hereafter find itself confronted with difficulties, the frequency and seriousness of which cannot now be foreseen.

CANTY, J.

Whether the interpretation given by Justice MITCHELL to G. S. 1894, § 4470, is the correct one, it is not necessary now to determine, but the question should be expressly reserved and not be made to appear to be foreclosed by the decision of this case. Conceding without deciding that the surviving husband or wife has for the benefit of the children a veto power on any testamentary disposition of the homestead by the other spouse, in this case the time to exercise that power has by the terms of section 4472, expired and the will must stand.

The question discussed by Judge Mitchell is altogether too complicated and too important to be disposed of without thorough consideration in a case in which it must be disposed of.

MARY K. DAVIS v. BOARD OF COUNTY COMMISSIONERS OF GRANT COUNTY.

December 21, 1898.

Nos. 11,281—(178).

75	59
81	72

Delinquent Tax Judgment—G. S. 1894, §§ 1582, 1589—Action to Reduce Amount—Demurrer.

Judgments entered in proceedings to enforce the collection of taxes remaining delinquent on real estate are final, under the provisions of G. S. 1894, §§ 1582, 1589, except as therein provided, and any person interested in any tract of land against which such proceedings are instituted must file an answer, if there is a defense as to all or any part of the amount levied and assessed. An action brought by the owner of the land, years after the entry of a tax judgment, to have a part thereof declared void, and the amount of the same reduced, on the ground that a portion of the levy and assessment was unauthorized and illegal, cannot be maintained.

Appeal by defendant from the order of the district court for

Grant county, C. L. Brown, J., overruling its demurrer to the complaint. Reversed.

Michael Casey, for appellant.

Geo. E. Darling, for respondent.

COLLINS, J.

Defendant, board of county commissioners for Grant county, appeals from an order overruling a general demurrer to the complaint in a very novel action brought by an alleged owner of real property through the foreclosure of a mortgage against the board, for the purpose of having a portion of each of three separate tax judgments entered in different years against said property, in proceedings under the statutes to enforce the payment of delinquent taxes, declared void and of no effect, and to have each of these judgments reduced in an amount equal to the portion declared void.

The complaint alleges the making of a contract between the former owner (mortgagor) of the land and the county for the purpose of obtaining a seed-grain loan, as provided in G. S. 1894, § 7733, et seq. It then in express terms sets out a levy and assessment of taxes upon the tract of land for each of the years 1894, 1895 and 1896, in strict accordance with sections 7735, 7736 and 7737, one-third of the amount of the loan being levied and assessed each year, and finally alleges that all of the taxes levied and assessed against this land, including said seed-grain taxes, for each of these years became delinquent, were subsequently reduced to tax judgments, and the real property was sold to satisfy the same, and also that these judgments are clouds upon the plaintiff's title.

On appeal—and, we presume, in the court below—counsel have argued two questions, one as to when the lien of the county attached, if at all, to the real estate, and the other as to the constitutionality of the statute under which the contract was entered into and the levy made. But they have certainly overlooked the fact, appearing from the complaint itself, that the amounts alleged to have been levied and assessed without authority of law have been made a part of the several tax judgments in proceedings instituted against the property to enforce the collection of delinquent taxes. These judgments were regularly entered in the years 1895, 1896 and 1897, after all parties interested were, in accordance with G. S.

1894, §§ 1584, 1588, given an opportunity to defend as to all or any part of the amounts levied and assessed. The plaintiff then, holding the mortgage upon the real estate, should have interposed an answer, and should then have raised the questions now argued. These tax judgments were final, under the express terms of sections 1582 and 1589, except as therein provided; and no one claims that plaintiff has brought herself within any of these exceptions by means of her complaint.

We shall not take time to consider who should be made defendant in a proceeding to vacate or set aside in part, or otherwise, a tax judgment. It is not necessary.

Order reversed, and on remittitur the court below will cause judgment of dismissal to be entered.

WILLIAM MUNCH v. GREAT NORTHERN RAILWAY COMPANY.

December 21, 1898.

Nos. 11,327—(70).

**Railway—Injury to Brakeman in Coupling Cars—Standard Coupler—
Negligence and Contributory Negligence Questions for Jury.**

Held, in an action to recover damages for personal injuries sustained by plaintiff, a brakeman in defendant's employ, while coupling cars equipped with what is known as the "standard coupler," that, on the evidence, the question of plaintiff's contributory negligence was for the jury; and that the question of actionable negligence on the part of defendant, in respect to the care and inspection of the coupler by which plaintiff was injured, was also for the jury.

Appeal by defendant from an order of the district court for Polk county, Ives, J., denying a motion for a new trial after a verdict for \$7,500 in favor of plaintiff. Affirmed.

C. Wellington, for appellant.

H. Steenerson and *W. E. Rowe*, for respondent.

COLLINS, J.

Plaintiff had a verdict in a personal injury action, and defendant appeals from an order denying its motion for a new trial. Its main

contentions are that there was no actionable negligence shown at the trial on its part, and that from the evidence it conclusively appeared that plaintiff was guilty of contributory negligence, and for that reason should not have recovered.

Plaintiff was in defendant's employ as a brakeman, and had been so employed for about two years prior to the day of the accident. He was then engaged in coupling freight cars in defendant's yard at Crookston. A box car had remained in the yard about 20 days, and was then put at the end of a string of cars, to be coupled onto another car standing on the main track. It was shown that both of these cars belonged to defendant, but there was some dispute as to whether the one last mentioned was a box or a flat. Both cars were equipped with what is known as the "improved standard coupler," an article somewhat difficult to describe, but which is supposed to couple cars automatically, and without requiring a person to stand between them as they come together. On each coupler is a fixed jaw, and also a movable "hooking jaw," and it is defendant's claim that on a straight track, as was the one where the accident happened, and with cars of the same make as were those in question, the coupling can always be made with but one of these movable jaws open. The plaintiff admits that, under such circumstances, the coupling will usually be made, but that to do the work properly, and to make a "sure" coupling, the movable jaws of both couplers must be open, and, further, that this is the usual and customary way of doing this kind of work.

A lever runs horizontally along the end of the car from near the outside, to a point a few inches above the coupler, and is there connected with what is called the lifting pin in the coupler itself, by means of a small chain hanging perpendicularly. Standing outside the car, the brake or switch man can operate the lever, and pull the pin up a few inches, so that the movable jaw will swing a short distance to one side. If the pin and other parts of the coupler are in good condition, the pin cannot be pulled entirely out of its socket, but is stopped by a spring and held fast at a certain point. If two cars are coupled, when the pin is thus raised the movable jaw of the coupler thus operated on is pulled to one side by the closed jaws of the other coupler, and the cars uncouple and separate. The jaw

thus pulled to one side, weighing over 50 pounds, then remains open, unless closed by hand, or by impact, when brought in contact with another coupler. When the coupler is closed, the raised pin drops to its place and remains there.

It stands admitted that, if two couplers are brought together on a curved track, or if they are badly worn, or if the cars are of different makes, they are not sure to work, unless the movable jaws of both are open; for one has to slip past the other, with very little room for variation. The plaintiff was an experienced man, and knew the manner in which these couplers do their work. He also knew that the coupler on the stationary car was open, and the movable jaw in proper position for locking with its counterpart on the moving car. The latter, one of a string before mentioned, was moving slowly, and plaintiff was walking beside it as the stationary car was approached. When within a few feet of the latter, plaintiff pulled the lever of the moving car, and stepped in front of it, between the rails, for the purpose, as he claimed, of opening the movable jaw, that a "sure" coupling might be made. He seized the jaw with his right hand, pulled it with considerable energy, and it immediately swung out of place, too far towards him, and would have fallen to the ground if plaintiff had not used all of his strength in pushing it back. It swung too far, because the pin had been broken in such a way that nothing prevented its slipping entirely out of the socket when raised by the lever, and thus permitting the movable jaw from becoming wholly detached from other parts of the coupler. And before plaintiff could remove his hand and arm, and before he could extricate himself from a dangerous position between the cars, they came together, and his hand and arm were caught in the couplers, and badly crushed, amputation of the arm being necessary. It was shown that the coupling was made, and that another brakeman, who happened to be near by, pulled the lever upon the stationary car, gave the go-ahead signal to the engineer, and thus released plaintiff from a grip which the couplers had upon the injured arm.

As before stated, it is defendant's contention that from the verbal evidence given upon the trial, and from two couplers of the same size and make, which were brought before the jury, it conclusively

appeared that, with the movable jaw of the coupler of the stationary car fully opened and ready for business, of which he knew, it was wholly unnecessary for plaintiff to open the jaw of the coupler of the moving car, or to go in front of it, for any purpose whatsoever. If it did so appear, from any evidence introduced upon the trial, it must be conceded that plaintiff had no cause of action. No rule of the company was shown which regulated, or attempted so to do, the manner in which couplings with the standard coupler should be made, the only rule introduced by defendant being one which required that

“Great care should be used in coupling and uncoupling cars; extra care is required when coupling foreign cars.”

This brings us to a consideration of the evidence upon the vital point above mentioned. According to plaintiff's testimony, he attempted to make the coupling in the ordinary manner, and exactly as he and other employees of defendant company usually made couplings with the standard coupler. He also testified that he stepped between the rails, and in front of the moving car, when it was five or six feet from the other; and that when he discovered that the pin was broken, and the jaw was sliding out of place, he pushed it back to prevent its falling upon his feet, or in such a way that he would be tripped and thrown under the wheels. When questioned as to the necessity of opening the jaw of the coupler on the moving car, with its counterpart on the stationary car open, he stated that such opening was necessary in order to make a “sure” coupling, although he admitted that sometimes couplings were made with but one jaw opened.

A witness for defendant, the conductor in charge at the time of the accident, then testified that on a straight track couplings could always be made with only one jaw of the standard coupler open, the cars being of the same size; and sometimes it might happen that couplings could not be made with the jaws open on both couplers, in which cases links and pins would have to be used. And, further, that couplings are surer when made with both movable jaws open, and that “we often open both; often where one is open we open the other,” in order to make sure of the coupling. It also

appeared from the conductor's testimony that occasionally the springs of a car would become worn, and settle down, so that the couplings would not be the same distance from the ground, thus rendering it much more difficult to couple with but one open jaw.

Another witness, a locomotive "foreman" in defendant's employ, testified on this branch of the case, giving it as his opinion that it was not necessary to open both jaws when the cars were upon a straight track. He was also examined as to the couplers brought into court, as before stated, and said that there was usually two or three inches side play or side motion with these couplers, and that they were likely to be loose, and to move sideways, to this extent, one way or the other.

So far as shown by the settled case, this was all of the evidence introduced by either party as to the necessity of stepping in front of the moving car, and, by hand, opening the coupler thereon as it approached that upon the stationary car, or as to the ordinary and usual manner in which such couplings were made. Upon this evidence, the question of plaintiff's negligence, when attempting to make the coupling in the manner shown, was for the jury. From the testimony it seems clear that defendant might naturally and reasonably anticipate or expect that, for the purpose of properly discharging their duties, switch or brake men might open both couplers instead of depending upon one.

Again, as before stated, two of these couplers were exhibited in the court room to the jury, and were operated for their benefit. The foreman testified that there was usually two or three inches of side play or motion to these couplers. While we have no means of knowing, it is possible that these experiments demonstrated to the jury that the side motion rendered the opening of both jaws, for one must slide past the other in order to lock, quite necessary, and had therefore become the usual and ordinary manner of doing the work.

Defendant's counsel also contends that plaintiff was conclusively shown to be guilty of contributory negligence when going between the cars, for the reason that, if it was customary and necessary to have both jaws open, the one in the moving car could easily have been put in position, long before it came within five or six feet of

the stationary car, allowing the plaintiff to perform his work in comparative safety. There might be cases where the court could say that a brakeman was reckless and extremely negligent in exposing himself to danger while coupling cars, depending upon the distance between cars to be coupled, the character of the ground between the rails, and the rapidity with which one or both of the cars were moving; but we cannot hold, where the intervening space is five feet at least, the ground level and unobstructed, as it was in this particular instance, and the moving car is going no faster than a man ordinarily walks, that there has been contributory negligence on the part of an employee which will prevent a recovery of damages in case he is injured.

One thing more should be mentioned in this connection. It is urged by counsel that plaintiff should not be allowed to recover because he was not justified in attempting to push the jaw back to its place, which attempt probably led to the injury; that he could have readily escaped the impending danger by letting go, and stepping out from between the cars. A man placed in a perilous position, as this was, cannot be expected to act with the deliberation of one who is not in peril. He must act instantly, and plaintiff was not required to stop and consider whether his chances to escape injury were greater if he let go of the jaw than they would be if he should hold on.

Defendant's counsel further contends that there was no actionable negligence shown on the part of defendant corporation. The car in question had been in the yard at Crookston for about 20 days, as heretofore stated, when the plaintiff was injured, and from the testimony it appeared that a car repairer was kept at work in this yard. From the appearance of the pin immediately after the accident, it had been broken some time, and it is ably argued that, as defendant's duty to inspect the coupling would be complied with when it exercised such reasonable care in that regard as would be demanded of a person of ordinary care and prudence under like circumstances, it cannot be held liable for want of inspection in this case, because it did not appear from the evidence that such a break could reasonably be anticipated, or that danger to an employee could reasonably be apprehended, if there was such a break.

Under the evidence here, it was a question of fact for the jury to pass upon whether defendant had or had not exercised reasonable care in respect to car inspection in this particular case. It might reasonably anticipate that the pins, or other parts of this cast-iron coupler, might become broken, especially where they lock by contact, more or less severe. It might also anticipate that, if a pin was broken, it would be because of its construction, at the point where this break actually occurred; and it might also anticipate that, when a pin broke at this particular place, there was imminent danger to any employee whose business it was to seize hold of and attempt to open a jaw of the size and weight of that in question.

It is true that the break was to some extent concealed while the pin rested in its socket, but as it extended, when in place and in good condition, clear through the coupler, and protruded some inches beneath, a glance at that point would have indicated to the car inspector or repairer that a part of the pin was missing. This would have clearly shown that it had been broken and was in an unsafe condition. It would have suggested that operating the lever and lifting what remained of the pin was unsafe and dangerous to any person engaged in opening the jaw with one hand while he operated the lever with the other.

And again, the broken condition of the pin would have been discovered by the car inspector or repairer if he had merely operated the lever, for it would then have been lifted out of the coupler, as it was when plaintiff undertook to make the coupling. In view of the circumstances shown upon the trial, that this break was not new, but was an old one, that the car had been in the yard for over 20 days, and that the condition of the pin was easily discoverable, we cannot declare, as a matter of law, that there was no actionable negligence on defendant's part in the matter of inspection.

It was the duty of defendant company to provide safe and suitable appliances and instrumentalities for its employees to work with, and to exercise reasonable diligence to keep these appliances and instrumentalities in proper repair. This necessarily involves examination and inspection as incident to the obligation to repair, and, in the discharge of this duty, the corporation must of necessity act through servants or agents, for whose negligence as to these

matters it is held responsible (*Tierney v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 311, 23 N. W. 229); and this is especially true when these appliances and instrumentalities are in constant and severe use, and liable to get out of repair (*Moon v. Northern Pac. R. Co.*, 46 Minn. 106, 48 N. W. 679). The question of defendant's negligence, on the facts before us, was peculiarly one for the jury.

The order appealed from is affirmed.

NICK DREW v. W. P. WHEELIHAN.

December 21, 1898.

Nos. 11,330—(152).

Purchase of Bank Check—Evidence of Bad Faith.

Bad faith in the purchase, for value, of an invalid and void bank check, may be partly evidenced by the gross negligence of the purchaser. It may also be shown by a variety of circumstances, some of them slight in character and others of greater significance.

Same—Question for Jury.

Held, in the case at bar, that the question of plaintiff's good or bad faith when purchasing the check in question was for the jury on the evidence.

Action in the municipal court of Duluth to recover \$400 upon a bank check for that amount, drawn by defendant upon the First National Bank of Grand Rapids, Wisconsin, and dated July 16, 1897. The other facts are stated in the opinion. The cause was tried before Edson, J., and a jury, which rendered a verdict for defendant. From a judgment in favor of defendant, plaintiff appealed. Affirmed.

Windom & McMahon, for appellant.

The check in question was offered and received in evidence on the trial, together with the indorsements thereon, thereby making a case for plaintiff in the absence of a valid defense. *Merchants & Mechanics Sav. Bk. v. Cross*, 65 Minn. 154; G. S. 1894, § 5751. If defendant fails to show plaintiff's knowledge of the defense to the

check at the time that he cashed the same, or to controvert the plaintiff's proof of bona fides, then the plaintiff is entitled to have a verdict directed in his favor. *Collins v. McDowell*, 65 Minn. 110; *Drovers v. Potvin*, 116 Mich. 474; *Borden v. Clark*, 26 Mich. 410; *Rosemond v. Graham*, 54 Minn. 323; 2 *Thompson, Trials*, § 2262.

The fact of the bank's indorsement upon the back of the check, with the same scratched off, would not tend to put plaintiff on inquiry. *Collins v. McDowell*, *supra*. The fact that one purchased a note under such circumstances as to induce suspicion that the title of the prior holder was defective, is not sufficient to show bad faith on his part in making the purchase. *Brown v. Tourtelotte*, 24 Colo. 204.

A bona fide holder is one who has taken the bill, note or check, without notice of any defense of which the defendant could avail himself in an action by a prior holder of the paper. *Bigelow, B. & N.* 437. Plaintiff cannot be affected with notice of other dealings of the defendant than those immediately connected with the contract sued upon. *Bottomley v. Goldsmith*, 36 Mich. 28; *Moorehead v. Gilmore*, 77 Pa. St. 118; *Freeman v. Savery*, 127 Mass. 75.

Gross negligence, when not disclosing bad faith, is not sufficient to admit equities against an indorsee for value. *Bigelow, B. & N.* 439; *Collins v. Gilbert*, 94 U. S. 753; *Brown v. Spofford*, 95 U. S. 474; *Farrell v. Lovett*, 68 Me. 326; *Seybel v. National*, 54 N. Y. 288; *Belmont v. Hoge*, 35 N. Y. 65; *Smith v. Livingston*, 111 Mass. 342; *Freeman v. Savery*, *supra*; *Crosby v. Grant*, 36 N. H. 273; *Hamilton v. Vought*, 34 N. J. L. 187; *Lake v. Reed*, 29 Iowa, 258; *Gage v. Sharp*, 24 Iowa, 15; *Hamilton v. Marks*, 63 Mo. 167; *Moorehead v. Gilmore*, *supra*; *Johnson v. Way*, 27 Ohio, 374; *Shreeves v. Allen*, 79 Ill. 553; *Howry v. Eppinger*, 34 Mich. 29; *Commercial v. First*, 30 Md. 11; *Woolfolk v. Bank*, 10 Bush, 504.

The true question for the jury is not whether there were suspicious circumstances, but whether the holder took the paper without notice of any infirmity or taint. *Smith v. Livingston*, *supra*; *Phelan v. Moss*, 67 Pa. St. 59; *Moorehead v. Gilmore*, *supra*; *Hamilton v. Vought*, *supra*; *Lake v. Reed*, *supra*; *Johnson v. Way*, *supra*; *Hamilton v. Marks*, *supra*; *Collins v. Gilbert*, *supra*;

Brown v. Spofford, supra; *Shreeves v. Allen*, supra; *Howry v. Eppinger*, supra; *Commercial v. First*, supra.

Mere knowledge of facts that would lead a prudent man to inquiry is not sufficient to defeat an indorsee for value. *Jones v. Gordon*, L. R. 2 App. Cas. 616; *Woolfolk v. Bank*, supra; *Freeman v. Savery*, supra. There must be something amounting to bad faith in the holder, such as a fraudulent turning away from a knowledge of facts, or a wilful blindness, before he will be affected with notice. *Knight v. Pugh*, 4 W. & S. 445; *Fletcher v. Gushee*, 32 Me. 587; *Ellicott v. Martin*, 6 Md. 509; *Ross v. Bedell*, 5 Duer, 462; *Sloan v. Union*, 67 Pa. St. 470; *Heath v. Silverthorn*, 39 Wis. 146.

James A. Hanks, for respondent.

Where there is fraud or illegality, the presumption is that he who is guilty of it will part with the note thereby acquired, for the purpose of enabling some party to recover on it. Such presumption operates against the holder, and suspicion follows the note into his hands and fastens upon his title. *Cummings v. Thompson*, 18 Minn. 228 (246); *Bank of Montreal v. Richter*, 55 Minn. 362. See also *Vosburgh v. Diefendorf*, 119 N. Y. 357; *Canajoharie v. Diefendorf*, 123 N. Y. 191. Gross negligence, though not of itself sufficient as a matter of law to defeat title, constitutes evidence of bad faith. *Seybel v. National*, 54 N. Y. 288; 1 *Parsons*, N. & B. 258; *Canajoharie v. Diefendorf*, supra. See also *Murray v. Lardner*, 2 Wall. 110, 121; *Dutchess v. Hachfield*, 73 N. Y. 226. If the purchaser knows generally that there is something wrong about the paper, it is sufficient to put him on inquiry and affect his title. 4 *Am. & Eng. Enc. (2d Ed.)* 303. Whether the party had such knowledge or not is a question for the jury. *Goodman v. Simonds*, 20 How. 343. What is sufficient to arouse suspicion is also a question of fact for the determination of the jury. 4 *Am. & Eng. Enc. (2d Ed.)* 304; *Fowler v. Brantly*, 14 Pet. 318; *Brown v. Taber*, 5 Wend. 566. See also *Schmueckle v. Waters*, 125 Ind. 265.

COLLINS, J.

Action by an alleged good-faith purchaser, for value, against the maker of a dishonored bank check. For the purposes of this appeal it stands admitted that the check was illegal and void in the hands

of McArthur, the payee, and Smith, one of the indorsers, under the provisions of G. S. 1894, § 6594.

The facts were that almost immediately after the check was signed by defendant at Duluth, it was indorsed by McArthur to Smith. The latter was a business man, residing in Duluth, while defendant was a resident of Grand Rapids, Wisconsin, temporarily in Duluth. Smith at once went to a saloon keeper in the place last mentioned, by the name of Hencke, and got him to go with him to the Commercial Bank in the same city for the purpose of obtaining the money, \$400. The officers of the bank refused to cash the paper without Hencke's indorsement. The check was then indorsed by Hencke as demanded, and also by Smith, and the money paid over to Hencke, who refused to turn it over to Smith until the check was sent to Grand Rapids and collected. Thereupon Smith and Hencke returned to the bank, Hencke paid back the \$400, and the check was delivered to Smith after Hencke had erased his absolute indorsement, and the bank had erased an indorsement it had made to another bank in Duluth for collection (upon which it had become liable). Smith forthwith went to West Superior, in the state of Wisconsin, and called upon Drew, the plaintiff, who was in the saloon business, and then proposed to the latter that if he would cash the check he (Smith) would "buy a drink." Another person who had been present when defendant signed the check, and who knew of its invalidity, seems to have been in the saloon at the time, about 3 o'clock of the afternoon of the day on which the check was drawn.

From plaintiff's testimony it seems that he looked at the face of the check, remarked that it was a large one, then looked at the back, saw the erased indorsements before mentioned, and asked what they were, and if the check had not been returned by the bank. To this inquiry Smith answered that he had previously turned the check over to Hencke; that the latter had received the money, but wanted to retain it until the bank collected the check; that he (Smith) needed the money, so he had obtained the check from Hencke, and had brought it to plaintiff to be cashed. The latter testified that he did not then know anything about the maker of the paper, nor about McArthur, the payee, nor did he know

where Grand Rapids was, except that it was in the southern part of Wisconsin; and that he had previously cashed checks for Smith, with whom he had been acquainted about seven years.

Plaintiff admitted that he had at his saloon telephone communication with Hencke and the Commercial Bank at Duluth, seven miles distant; that he knew there were several banks in that city, as well as in West Superior. Immediately after cashing the check, and, of course, during banking hours, plaintiff went in person to the bank in the last-named city where he kept his account and transacted his business, and there indorsed and left the check for collection, not for deposit on account. Meantime payment had been stopped, and hence this action.

The illegality of the check being admitted on this appeal, the cause must be disposed of precisely as if the admission had been made at the trial. Therefore the burden of proof was on plaintiff to establish his good faith when taking the instrument. The presumption was against him, and it was incumbent upon him to overcome it. *Bank of Montreal v. Richter*, 55 Minn. 362, 57 N. W. 61.

But the plaintiff was entitled to protection as an innocent purchaser, unless he had knowledge or notice of such facts that his failure to make inquiry, when taking the check, amounted to bad faith. *Collins v. McDowell*, 65 Minn. 110, 67 N. W. 845. Gross negligence, although not of itself sufficient, as a question of law, to defeat title, constitutes evidence of bad faith. *Canajoharie v. Diefendorf*, 123 N. Y. 191, 25 N. E. 402.

As was stated in *Murray v. Lardner*, 2 Wall. 121, the rule may be said to resolve itself into a question of honesty or dishonesty, for guilty knowledge and wilful ignorance alike invoke the result of bad faith. And bad faith in one of these transactions is based upon a variety of circumstances, some of them slight in character, and others of greater significance. *Dutchess v. Hachfield*, 73 N. Y. 226.

A reputable banking house might discount or purchase an invalid check, presented to it by a man of integrity, without being suspected of bad faith; while an individual not engaged in banking, or in any business which would naturally lead him into discounting or purchasing negotiable paper, taking the same check from an

irresponsible party, and under peculiar circumstances, might easily be suspected of having directly or impliedly connived at wrong, or, at least, that he was not unwilling to close his eyes and ears when taking the paper, so that he might not ascertain its real character.

Whether a purchaser has notice or knowledge of the invalidity of the paper, or has means of knowledge which he wilfully disregards, is usually a question for a jury, not for a court. See *Yellow Medicine Co. Bk. v. Tagley*, 57 Minn. 391, 59 N. W. 486.

It is claimed here by counsel for plaintiff that at the trial the presumption of knowledge in plaintiff was rebutted and entirely overthrown, and that by the evidence it was conclusively shown that he was an innocent purchaser, and entitled to a verdict. We cannot concur in this view.

While the testimony on which the verdict for defendant is rested is not very convincing, we are of the opinion that it was sufficient. And in saying this we are not unmindful of the fact that both plaintiff and Smith asserted under oath, and in the most positive manner, that the former exchanged his money for this check in the utmost good faith, without the slightest suspicion of its bad character, and in the absence of all circumstances which would or should arouse his suspicion.

Plaintiff was not a banker, nor was he engaged, remotely or otherwise, in the banking business. He was a saloon keeper. True, he had, according to the evidence, cashed checks for Smith on previous occasions. How large does not appear, but evidently this was for a much larger sum than any check which had previously been presented, so large, in fact, that it would seem somewhat remarkable that Smith would expect plaintiff to cash it.

Smith resided in Duluth, seven miles distant, in which city there were several banks, and plaintiff knew that the check, although dated at Grand Rapids, had been executed in Duluth that day, and had there passed by indorsement into Smith's hands. There was no direct evidence as to Smith's character, or business standing, or what plaintiff knew of him, but, in passing, it may be observed that the Duluth bank would not cash the check with his indorsement only, but required Hencke's, and when the money was paid over to the latter he refused to allow it to go into Smith's possession until

the check, which he had indorsed at Smith's solicitation, had been collected by the bank.

From this it is apparent that a banking institution in Smith's home town, and also one of his personal friends in the same place, notwithstanding his pressing need for ready money, had declined to allow the amount of the check to go out of their hands upon his indorsement alone. This tended to show that Smith was lacking either in means or integrity or both. More than this, although needing the money, Smith failed to call upon any other Duluth bank, but went out of the state to West Superior. And then, instead of presenting the check to a bank for discount, as we might reasonably expect of a business man who had formerly resided in that city, he appeared at a saloon, during banking hours, and proposed to the saloon keeper that he would buy a drink if he would cash the paper. This of itself was not an ordinary transaction. But plaintiff examined the check, which was drawn on a bank in a distant part of the state by a total stranger to him, and had on its back two recently erased indorsements,—one absolute (that of Hencke); the other for collection (that of the bank). He was also told by Smith that the money had been obtained at the bank, but that Hencke had refused to let it go out of his own hands until the check had been collected. Without a word of further inquiry, and with the means at hand for obtaining some information in respect to the paper, plaintiff went away from his place of business,—where was not shown,—procured the money, turned it over to Smith, and with great promptness took the check to the bank with which he did business, and there left it for collection.

It cannot be said that any particular one of these circumstances was sufficient of itself to warrant a finding of plaintiff's bad faith, but, taking them all together, some of them of slight significance, but others of more importance, we are compelled to hold that it was a case for the jury, and that their verdict against plaintiff cannot be disturbed on this point. These circumstances could well be considered by the jury when passing upon the testimony of plaintiff and Smith as to the bona fide character of the transaction. See *Schwartz v. Germania L. Ins. Co.*, 21 Minn. 215; *Hawkins v.*

Sauby, 48 Minn. 69, 50 N. W. 1015; Merchants Nat. Bk. v. Sullivan, 63 Minn. 468, 65 N. W. 924.

Plaintiff's counsel have relied with much confidence on Collins v. McDowell, supra, but an examination of the facts in that case will show that those now before us are altogether different.

Judgment affirmed.

ANDREW FLOBERG v. FAY S. JOSLIN.

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December 21, 1898.

Nos. 11,837—(116).

Defective Return on Appeal—Presumption.

Where a return on appeal from a judgment of dismissal fails to show what became of a motion made by defendant to strike out a reply as sham, it cannot be assumed that the motion was granted. If, in fact, the reply was stricken out, it was defendant's duty to cause the return to be amended in conformity with the fact.

Complaint Good—Judgment of Dismissal Erroneous.

Held, that the complaint herein contained facts sufficient to constitute a cause of action, and, in the absence of anything in the return from which it appears that the court was right in its conclusion, although giving a wrong reason therefor, that a judgment against the plaintiff of dismissal on the ground that said complaint failed to state facts sufficient to constitute a cause of action was erroneous.

Same—Amendment of Judgment after Appeal.

An amendment of such a judgment so as to make it one of dismissal only, made by the court below after an appeal has been taken and a return filed in this court, cannot affect plaintiff's rights on appeal.

Appeal by plaintiff from a judgment of the district court for Clay county, entered pursuant to an order for judgment on the pleadings, Baxter, J. The facts are stated in the opinion. Reversed.

F. H. Peterson, for appellant.

C. E. Joslin, for respondent.

The court will not review an order or decision on a partial presentation or disclosure of the case upon which such order or decision was made. Dow v. Northern Land & L. Co., 51 Minn. 326;

Firth v. Brack, 64 Minn. 242. A correct decision will not be reversed on appeal because a wrong reason is given therefor. **Bunday v. Dunbar**, 5 Minn. 362 (444); **Zimmerman v. Lamb**, 7 Minn. 336 (421); **Wieland v. Shillock**, 23 Minn. 227; **Morrow v. St. Paul City Ry. Co.**, 65 Minn. 382; **Brazil v. Moran**, 8 Minn. 205 (236).

COLLINS, J.

Appeal by plaintiff from a judgment of dismissal on the ground, as stated therein, that the complaint failed to contain facts sufficient to constitute a cause of action.

After much labor with a very confusing record, we find the facts to be that in the complaint it was alleged that for several years prior to 1892 plaintiff was the owner of, and was then occupying, a farm of the value of \$6,400, on which were mortgages given to secure an indebtedness of \$3,664, defendant being one of the mortgagees; that in December of that year these parties entered into an agreement under which defendant obtained from plaintiff another mortgage upon the farm to secure the payment of plaintiff's note, due in five years, for the total amount of plaintiff's aforesaid indebtedness, and also obtained an assignment to herself of a lease of the farm for the term of five years, which plaintiff had just then entered into with a tenant to whom he had surrendered possession, in consideration of which, according to the complaint, defendant promised plaintiff to take and hold the farm in trust for five years, and to protect plaintiff as against all of the mortgage indebtedness first mentioned; to apply the rents, profits and proceeds of said farm during that period on account of said indebtedness; and to give to plaintiff the benefit of all discounts and deductions which might be obtained when settling up plaintiff's indebtedness.

The complaint then alleged a fraudulent violation of this agreement by defendant, by her refusal to account to plaintiff in any manner for the rents, profits and proceeds of the farm for any part of the five-year term, and also that in fraud of plaintiff's rights she obtained assignments of two of the mortgages against which she was to protect plaintiff, and then fraudulently foreclosed them, and, after purchasing the premises at the sales in her own name, unlawfully took possession of the farm, and has ever since asserted

absolute ownership of the same. The relief demanded was an accounting, the setting aside of the foreclosures and the fixing of a time within which plaintiff might redeem.

To this complaint defendant answered, admitting plaintiff's indebtedness as stated, but denying the agreement in every particular. As a second defense the answer set forth a former adjudication of all matters alleged in the complaint, and a judgment of dismissal, in an action between these parties, entered and docketed in October, 1897, in defendant's favor, as more clearly and fully appeared in a copy of the judgment roll in said action, attached to and made a part of the answer. This copy was a complete exemplification of all proceedings in an action in which this same subject-matter was in controversy.

This was the condition of the pleadings when plaintiff's counsel noticed the case for trial at the November, 1897, term of the court, and when, at the same time, counsel for defendant gave notice that he should move for judgment on the pleadings at the opening of the term. The former at once served a reply, a denial of each and every allegation of new matter contained in the answer, whereupon the latter gave notice of a motion to strike out the reply as sham. The record before us fails to disclose the fate of this motion to strike out, but at the term at which both motions were to be heard the court made its written order, in which, after reciting that defendant's motion for judgment on the pleadings was duly argued, it directed that the action be dismissed on the ground that a cause of action was not stated in the complaint. The judgment appealed from was entered on this order December 22, 1897, and the appeal was taken in June, 1898.

With this record, the judgment must be reversed.

The complaint stated a good cause of action, and defendant's counsel has not, in brief or on the argument, claimed that it did not. And, with a record before us from which nothing appears to the contrary, we must assume that the reply remained a pleading in the cause when the order was made and the judgment entered. So, with a complaint stating a good cause of action, an answer putting in issue the allegations of the complaint, and also setting up new matter in bar, and a reply in which this new matter is controverted

without qualification, there is no ground upon which the order for judgment, or the judgment itself, can be sustained.

At the argument, defendant's counsel insisted that the return was defective and incomplete. It was sufficient for his opponent's purpose, in that error of the court below was made to appear. If a true and complete return would have shown that there was no error in the order directing judgment, although a wrong reason therefor might have been given, it was the duty of defendant's counsel to procure an amendment,—a thing he failed to do. From a supplemental return procured by him it is shown that about three months after plaintiff's appeal he moved the court below for, and obtained, an order directing that the judgment be amended by striking out all reference to the complaint, and this was done, so that after December 22, 1897, the judgment was simply one of dismissal.

At the argument, counsel urged quite zealously that we should now consider the judgment as amended. This cannot be done. Plaintiff's counsel appealed from the judgment, a return was made, and thereafter the court below could not amend the original judgment so as to affect plaintiff's rights on appeal. But if this could have been done, or if the judgment had originally omitted all reference to the insufficiency of the complaint, a judgment of dismissal could not have been upheld, with the pleadings in the condition they were when the trial court made its order.

Judgment reversed.

JOHN W. DWIGHT v. WENZEL LENZ.

December 21, 1898.

Nos. 11,356—(138).

Principal and Agent—Note Payable at Given Place—Authority to Receive Payment.

The mere fact that a note is made payable at a certain place does not of itself confer any agency upon the owner or occupant of that place to receive payment in behalf of the payee. In order to make such owner

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or occupant the payee's agent to receive the money, the paper must be indorsed to or lodged with him for collection.

Same—Possession of Securities of Principal—Withdrawal of Securities.

A debtor is authorized to infer that a third party, having possession of his note and mortgage at maturity, is, as the creditor's agent, empowered to receive both principal and interest, there being no suspicious circumstances surrounding such possession. But, being founded upon the fact of custody of the securities, such inference ceases whenever they are withdrawn by the creditor.

Same—Foreclosure of Mortgage—Finding of Payment not Sustained by Evidence.

Held, in the action at bar, brought to foreclose a real-estate mortgage, and on the trial of which the court below found as a fact that payment of the mortgage note had been made by the mortgagor to one W., as the mortgagee's agent duly authorized to receive the amount due, that there was no evidence on which to base such a finding.

Appeal by the plaintiff from a judgment of the district court for Wilkin county in favor of defendant, pursuant to the order of C. L. Brown, J. Reversed.

McCumber & Bogart, for appellant.

The naming of a place for the payment of a note does not make the owner of that place an agent to collect the note, or to receipt for the money. No power, authority or duty, is thereby conferred upon such person in reference to the note. 1 Daniel, Neg. Inst. § 326; *Hills v. Place*, 48 N. Y. 520; 1 Randolph, Com. Paper, § 125. See also *Balme v. Wambaugh*, 16 Minn. 106 (116); *Trull v. Hammond*, 71 Minn. 172. No presentment at the place named is necessary to give a right of recovery against the maker. It only relieves him from damages, if he was ready at the time and place named to pay it and there was no one to receive it. Such readiness is equivalent to a tender, and an answer pleading that fact, and a payment of the money then due into court, will be a bar to the recovery of the interest and costs, but not the cause of the action. *Hills v. Place*, supra; 1 Daniel, Neg. Inst. § 643. Payment of a bill or note should be made to the legal owner, or holder, thereof or some one authorized by him to receive it. 2 Daniel, Neg. Inst. § 1230; *Paris v. Moe*, 60 Ga. 90.

W. E. Purcell and *Gustav Schuler*, for respondent.

The defendant's position here is controlled by the recent decisions of this court in *Hare v. Bailey*, 73 Minn. 409, and *General Convention of C. M. v. Torkelson*, 73 Minn. 401. While the weight of authority seems to be that the simple making of a note, payable at the office of an individual not a banker, does not of itself constitute the person, at whose office the note is made payable, the agent of the payee for its collection, yet the courts of two states have held to the contrary. See *Lazier v. Horan*, 55 Iowa, 75; *Bank v. Zorn*, 14 So. C. 444.

COLLINS, J

Action to foreclose a real-estate mortgage given to plaintiff to secure defendant's promissory note for \$1,000. Defense, payment of the note to one Wood, alleged to have been plaintiff's duly-authorized agent for the purpose of receiving the money.

The plaintiff was a resident of New York, doing more or less business in North Dakota. Wood was a loan agent at Wahpeton; in the last-mentioned state. Defendant was a resident of Minnesota, and employed Wood to negotiate a loan of \$1,000 for him. Wood, who had some acquaintance with plaintiff, soon afterwards met and informed him of the opportunity to make this loan, whereupon plaintiff, who had sufficient knowledge of the security offered, drew his check for \$1,000 and handed it to Wood, with instructions to make the loan.

The note—due in three years, with three interest coupons attached (all being made payable at Wood's office)—and the mortgage were then executed and delivered by defendant, and left in Wood's possession. The mortgage was duly recorded, and then forwarded, with the note (payment thereof guarantied by Wood) and attached coupons, to plaintiff, in New York. He has retained possession of both note and mortgage all of the time until the commencement of the action.

Soon after the first coupon became due, in 1893, defendant paid the amount thereof to Wood, at his office, and the latter remitted to plaintiff by draft, with a request that the coupon be sent to him. Plaintiff indorsed the coupon to Wood, without recourse,

and the latter delivered it to defendant. The coupons maturing in 1894 and 1895 were paid in the same way by defendant, were indorsed by plaintiff in the same manner, and in due course of time were delivered into defendant's possession.

When remitting in each of these instances, Wood used a blank form of letter, addressed to plaintiff, and informing him

"Herewith please find report of collections, and draft to cover same,"

in matter of Lenz interest coupon. When making the last remittance, in November, 1895, the principal sum then being due, Wood asked plaintiff,

"Can I extend for Mr. Lenz the loan until June 1, 1896?"

to which plaintiff replied that he disliked to extend.

Nothing more was done until June, when plaintiff wrote to Wood concerning the payment of the past-due note. On receipt of this letter, Wood directed plaintiff to send the note and mortgage to the National Bank of Wahpeton for collection, which was done, Wood being notified of the fact.

Defendant paid the amount due on the note to Wood at his office on July 1, 1896; the note, mortgage and satisfaction piece then being at the bank. Wood kept the money, and soon afterwards became insolvent.

The court below found as a fact that the payment was made to Wood, at his office, as plaintiff's agent duly authorized to receive the amount due, and ordered judgment in defendant's favor.

The appeal is from a judgment entered after a "case" was settled, and a motion for a new trial denied.

The only question which we need to consider is whether this particular finding of fact was supported by the evidence. Was there any evidence that Wood was plaintiff's agent duly authorized to receive the money? If there was, the plaintiff must be the loser. But, if not, the loss, severe as it may be, will fall upon the defendant mortgagor.

From the evidence it is obvious that Wood was defendant's agent for the purpose of obtaining the loan, but that he became plaintiff's

agent for disbursing the amount of the check. When plaintiff placed the check in Wood's hands, with directions to make the loan, taking the note and real-estate mortgage, not then executed, Wood became plaintiff's agent for that special or particular purpose. Had Wood then appropriated the money, it would have been plaintiff's loss, not that of defendant. But this act did not of itself constitute Wood plaintiff's agent for collecting either principal or interest. Nor was Wood authorized to receive the money because the note and coupons were made payable at his office.

The mere fact that a bill or note is made payable at a certain place does not of itself confer any agency upon the owner or occupant of that place to receive payment on behalf of the payee. In order to make such owner or occupant the payee's agent to receive the money, the paper must be indorsed to or lodged with him for collection. 1 Daniel, Neg. Inst. § 326, and cases cited; 1 Randolph, Com. Paper, § 125, and cases cited in note.

But it is urged that for three successive years defendant paid the money due on the interest coupons to Wood, as the coupons matured, and that the latter forwarded it to plaintiff, who returned the coupons for delivery to defendant. An examination of defendant's testimony reveals the fact, however, that, when making these payments of interest, defendant made them to Wood as his own agent, and not as the agent of plaintiff. He testified that when making the payments he knew that Wood did not have the note or coupons, and that the mortgagee resided somewhere in the East; that he also knew that the money paid, as interest or principal, would have to be sent to this person before the note or coupons would be sent to Wood; and that when the mortgagee received the money he would transmit the interest coupons and the note to said Wood. This he seems to have known and understood fully when handing his money to Wood. We are of opinion that, construed as favorably as possible in defendant's behalf, the evidence concludes him upon the claim that Wood acted as plaintiff's agent when receiving the money.

Again, when these coupons were delivered to defendant they were made payable to Wood, without recourse, by plaintiff's special

indorsement. This indicated that plaintiff, at least, did not consider Wood as his agent. But if the fact had been that plaintiff from time to time, as they matured, had forwarded the interest coupons to Wood for collection, instead of keeping them until he received his money, this would not of itself have authorized payment to Wood, as plaintiff's agent, of the principal sum when it became due in the future. *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642. And it will be remembered that the principal of the note, with interest accruing subsequent to its maturity, is the only amount herein involved.

Even if Wood had, as plaintiff's agent, held the note, coupons and mortgage for awhile after they were executed and delivered by defendant, and as such agent had received payments of the coupons, defendant would not have been justified in paying the principal sum to Wood after plaintiff had withdrawn the note and mortgage from his possession, although payment was made in ignorance of such withdrawal.

A debtor is authorized to infer that a third party, having possession of his note and mortgage at maturity, is, as the creditor's agent, empowered to receive both principal and interest, there being no suspicious circumstances surrounding such possession. But such inference, being founded upon the fact of custody of the securities, ceases whenever they are withdrawn by the creditor. *Williams v. Walker*, 2 Sandf. Ch. 325.

It is, of course, a great hardship to require payment of a debt twice; but when the debt is evidenced by a promissory note the debtor may easily protect himself and others against all possibility of loss by demanding that the note be produced when payment is made.

Another circumstance on which counsel for defendant rely is that, in his letters remitting the interest to plaintiff, a blank form being used, Wood reported the remittances as "collections." We see nothing in this point. The form of the letters accompanying the drafts—the use of the word "collections"—would not suggest to the ordinary business man that the writer was acting or assuming to act as the creditor's agent. Nor was it shown that de-

fendant had any knowledge of the phraseology of Wood's letters of transmittal.

Nor does the evidence relating to an extension of the time for payment of the principal tend to establish Wood's agency. If it has any bearing at all on the subject, it is in opposition thereto. When remitting the interest last paid by defendant, Wood asked, "Can I extend * * * the loan until June 1, 1896?" to which plaintiff replied, "I dislike very much to extend." Nothing more occurred in relation to an extension until June, when plaintiff wrote to Wood, referring to the request to extend payment until June 1, which, he says in his letter, "I consented to do;" and then he inquired, "Will you kindly advise me what disposition you wish to make of this matter?"

From this correspondence it appears that Wood was seeking authority from plaintiff to postpone the day of payment; that the latter, after expressing a dislike so to do, did in fact extend the time, by allowing matters to remain as they were, and then, when the period asked for expired, reminded Wood of the fact, and asked what disposition he desired to make of the matter. When we have in mind that Wood had guarantied payment of the note, we can see that what passed by means of these letters suggests that Wood was acting either in behalf of the defendant, who, so far as appears, had no knowledge of the contents of the letters, or in his own behalf, as such guarantor.

Not one of the acts hereinbefore referred to established Wood's agency, nor was such agency shown by combining and considering them all. There was no evidence upon which the finding of fact as to his agency could have been based.

Finally, as to the claim that plaintiff is estopped from asserting that Wood was not his agent for the purpose of receiving payment, there is not a single element of estoppel in the case. The plaintiff was not guilty of any fraud upon defendant, nor did he perform any act or make any declaration or admission which deceived or misled defendant, nor can he be charged with gross neglect or express design that any act, statement or admission on his part should in-

fluence or induce defendant into paying the amount due on the note to said Wood.

The judgment is vacated and set aside, and a new trial ordered.

JOSEPHINE CHURCH v. CHURCH CEMENTICO COMPANY.

December 21, 1898.

Nos. 11,377—(169).

Corporation—Assumption of Debt of Predecessor—Evidence.

Held, under the evidence at the trial of this action, that there was none upon which could be based a finding that defendant corporation had assumed or promised to pay a debt or liability of its predecessor in business. The fact that other obligations of the predecessor had been paid by the corporation did not tend to establish such an assumption or promise.

Contract between Officer of Corporation and Company—Salary for Services.

A stockholder in a corporation, acting as its president, may enter into a salary contract for his services with it; but he cannot use his position when making such contract to his own advantage, or to the disadvantage of the corporation; nor can he bind it to pay him a greater salary than his services are reasonably worth; a contract of this kind between such president and the acting secretary and treasurer of the corporation will be scrutinized with great care.

Same—Evidence.

Held, that the evidence in this action warranted a finding that such secretary and treasurer represented another stockholder, the owner of all of the stock shares except those held by the persons just mentioned, and was authorized to manage her interests therein; and also evidence which would warrant a finding that the shareholder last referred to was bound by the contract as to salary, because she could have learned of its existence in the exercise of ordinary prudence and diligence, and should then have repudiated it.

Error to Admit Evidence of Conversation.

It was reversible error for the court below to allow evidence of private conversations between the president of the corporation and his wife, this plaintiff, as to what agreement he had made with respect to the amount of his salary.

Action in the district court for Ramsey county to recover \$900 for the unpaid portion of salary of William Church from November, 1895, to April, 1897, inclusive. The memorandum mentioned in the opinion was as follows:

"This is to certify that I have this agreement and understanding with Wm. Church in relation to the Church Cementico Co. I am to pay him a salary of \$125 per month, of which he agrees to leave \$50 per month in the business, that he is to devote his time to the business. Said Church is to have a half interest in the business as follows: The profits are to be equally divided between us and whenever the profits apportioned to said Church equal the amount of money contributed by me, then he is to have a half interest in the said Cementico business. The sum of \$50 per month left in the business from his salary to go to his profits. If the business shall be sold at any time, then Church is to have the \$50 per month in cash.
Ross Clarke."

The complaint alleged that this memorandum was made in January, 1896, and, after its organization, the defendant corporation duly ratified the agreement so made in its behalf; that the business was sold by defendant about May 15, 1897, and that no profits were realized out of the business. The cause was tried before O. B. Lewis, J., and a jury, which rendered a verdict for \$944.28 in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Reversed.

Bishop H. Schriber, for appellant.

Before a corporation can be bound by a contract made on its behalf by a promoter, before it came into existence, the contract must have been ratified and adopted. *Battelle v. N. W. Cement & C. P. Co.*, 37 Minn. 89. The vote of a board of directors of a corporation fixing the compensation of any of its directors as officers is prima facie voidable. *Jones v. Morrison*, 31 Minn. 140; *Deane v. Hodge*, 35 Minn. 146; *Currie v. School District*, 35 Minn. 163; *Rothwell v. Robinson*, 39 Minn. 1.

Edwin A. Jaggard, for respondent.

A corporation may impliedly contract to pay for services rendered to it, in pursuance of an express contract made on its behalf prior to organization, by accepting such services. Rendering serv-

ices after incorporation is the consideration for the promise by the company to pay for those rendered for its benefit before organization. See "Principles of Law Relating to Corporate Liability for Acts of Promoters" by Malcolm Lloyd, Jr., 36 Am. L. Reg. & R. (N. S.) 674. It is immaterial whether the liability of the corporation be based upon what is described by the language of the law as "ratification," (*Whitney v. Wyman*, 101 U. S. 392; *Buffington v. Bardon*, 80 Wis. 635; *Stanton v. New York*, 59 Conn. 272; *Negley v. Lindsay*, 67 Pa. St. 217; *Lowe v. Connecticut*, 45 N. H. 370); or as "adoption," (*Pratt v. Oshkosh Co.*, 89 Wis. 406; *Penn v. Hapgood*, 141 Mass. 145; *Abbott v. Hapgood*, 150 Mass. 248; *Munson v. Syracuse*, 103 N. Y. 58; *Rogers v. New York*, 134 N. Y. 197); or as "the making of a new contract," (*McArthur v. Times Printing Co.*, 48 Minn. 319); or as "estoppel," (*Grape v. Small*, 40 Md. 395; *Weatherford v. Granger*, 86 Tex. 350; *Joy v. Manion*, 28 Mo. App. 55; *Lowe v. Connecticut*, *supra*; 3 *Thompson, Corp.* 480).

This is the rule in Minnesota. *Battelle v. N. W. Cement & C. P. Co.*, 37 Minn. 89; *McArthur v. Times Printing Co.*, *supra*; *Mackellar v. Anchor Mnfg. Co.*, 48 Minn. 549; *Willis v. St. Paul Sanitation Co.*, 53 Minn. 370; *St. Paul & M. T. Co. v. Howell*, 59 Minn. 295; *Rosemond v. N. W. Autographic Reg. Co.*, 62 Minn. 374.

A corporation cannot shield itself from the charge of constructive notice by saying that the impersonal corporate entity had no actual notice of the facts. *St. Paul & M. T. Co. v. Howell*, *supra*. This is easily a case in which guilty ignorance is an equivalent of actual knowledge. *Finance Co. v. Old Pittsburgh Coal Co.*, 65 Minn. 442. See *Kraniger v. Peoples Bldg. Soc.*, 60 Minn. 94; *Horn Silver Min. Co. v. Ryan*, 42 Minn. 196; *Mackellar v. Anchor Mnfg. Co.*, *supra*; *Deane v. Hodge*, 35 Minn. 146; 1 *Morawetz, Priv. Corp.* §§ 551, 561; 2 *Lindley, Part.* 595, 596. Means of knowledge plainly within the reach of the stockholders by the exercise of the slightest diligence, is in legal effect equivalent to knowledge. *Jesup v. Illinois Cent. R. Co.*, 43 Fed. 483.

A director is not forbidden to make a contract with his corporation for his personal services, when such services were actually rendered and the transaction is open and free from blame. *Twin-Lick Oil Co. v. Marbury*, 91 U. S. 587; *Harts v. Brown*, 77 Ill. 226.

There are very many implied as well as express contracts which a director may make with his corporation. See *Twin-Lick Oil Co. v. Marbury*, *supra*; *Hotel Co. v. Wade*, 97 U. S. 13; *Santa Cruz v. Spreckles*, 65 Cal. 193; *Hallam v. Indianola*, 56 Iowa, 178; *Harts v. Brown*, *supra*; *Sanborn v. Lefferts*, 58 N. Y. 179; *Brinham v. Wellersburg*, 47 Pa. St. 43; *Hope v. Valley*, 25 W. Va. 789; 2 Cook, Stockh. §§ 660, 663; *Duncomb v. New York*, 84 N. Y. 190, 88 N. Y. 1; *Harpending v. Munson*, 91 N. Y. 650; *Borland v. Haven*, 37 Fed. 394; *Kelley v. Newburyport*, 141 Mass. 496; *Morse v. Home Sav. & L. Assn.*, 60 Minn. 316; *Battelle v. N. W. Cement & C. P. Co.*, *supra*; *Mackellar v. Anchor Mnfg. Co.*, *supra*; *Ward v. Polk*, 70 Ind. 309; *Hospes v. N. W. Mnfg. & Car Co.*, 48 Minn. 174; 3 Thompson, Corp. §§ 4059-4075.

COLLINS, J.

Assuming, as we shall, for the purposes of this decision, and as asserted by plaintiff's counsel, that William Church, plaintiff's husband, was in the employ of Ross Clarke for the year ending November 1, 1896, and that they were not copartners in business; and, further, that the evidence at the trial was ample to support a finding that an assignment of that part of Church's salary which was mentioned and reserved in the memorandum signed by Clarke was duly and legally made to plaintiff, so that she had a right of action against some one when the business was sold; and also assuming that, as to this branch of the case, the assignments of error in respect to the admission or exclusion of evidence at the trial are not well taken, and also that the court did not err in its charge,—we are brought directly to a consideration of the facts as shown by the record concerning the assumption of the alleged indebtedness of Ross Clarke to plaintiff, by defendant company, at the time of the incorporation or later, although not then due, but which actually matured and became payable in cash when the business was sold to the Baker Company.

Was there any evidence upon which to rest a finding that defendant company ever assumed, expressly or by implication, that obligation? And this question is to be answered with the facts in mind that Church held one share of defendant's stock; that Ross

Clarke held one share; that his wife, Anna W. Clarke, held the remainder, 48 shares; that these three persons were named as the first board of directors in the articles; that Mr. Church acted as, and assumed to be, the president of the corporation; and that Mr. Clarke acted as, and assumed to be, the secretary and treasurer. Mrs. Clarke had been in some way named as vice president, but it was not shown that she was advised of the honor, or ever acted as such. These facts and these relations demand of us a close scrutiny as to the assumption agreement, and required of the persons who pretended to act, the highest degree of fairness. *Battelle v. N. W. Cement & C. P. Co.*, 37 Minn. 89, 33 N. W. 327.

The articles of incorporation of defendant company were executed and filed October 29, to take effect November 21, 1896. Just before this, there had been, according to the testimony in plaintiff's behalf, a conversation between Mr. Church and Mr. Clarke, in which the latter promised that what was then due on account of this agreement as to the \$50 per month, then amounting to \$600, should be assumed and paid by the corporation. There was also some conversation between plaintiff, Mrs. Church, and Clarke, in which Clarke stated that he had made such an agreement with Mr. Church, and that Church should continue to receive a salary of \$125 per month, of which \$75 should be paid in cash each month, and the balance should be credited as before.

This was nothing more than a promoter's promise, and was of no validity as against the corporation thereafter brought into life. It could not be bound by the promise, for it could have no agent to act in its behalf before it had an existence. *Battelle v. N. W. Cement & C. P. Co.*, *supra*; *McArthur v. Times Printing Co.*, 48 Minn. 319, 51 N. W. 216.

Nor does counsel claim that, taken by itself, there was a promise, either as to the past or future, which would bind the contemplated corporation. But the contention is that the evidence in some manner discloses that the promise or agreement made in advance by the promoter was afterwards adopted, expressly or by implication, by the corporation, became its engagement, and as valid as if it had never been thought of until the corporation was organized. It is true that this corporation could adopt the promise and agree-

ment of the promoter, and bind itself to the same extent as it could be bound upon a similar, but purely original, engagement.

The only evidence tending to show an adoption of the promise or agreement by the corporation was that, soon after the organization, Church, who kept the books both before and after November 2, asked Clarke if the old business should be balanced, and an entry made in the journal of the change in affairs, whereupon the latter replied that this was unnecessary;

"Let it run just the same; we assume all the liabilities of the old concern."

At most, this was nothing but a conversation between the president of the corporation and its secretary and treasurer, in respect to an indebtedness of the latter, in the payment of which the former was vitally interested. Its object was to bind the corporation, in which both of these persons had an interest, amounting to 4 per cent. of the stock shares, and to appropriate its funds to the payment of the debt of one of them, and, to all intents and purposes, due to the other. It had not been shown that the corporation was under any legal obligation to pay this debt, or that it had received any consideration for a promise to pay.

The other stockholder, holding 96 per cent of the capital stock, knew nothing of the transaction, and had never heard of the indebtedness, or of any effort on the part of Church or Clarke to saddle the claim upon the corporation. And it stands conceded that the directors, as a board, never assumed this or any other obligation of the business predecessor of the corporation. It was shown that, out of the assets of defendant, some of the liabilities, existing at its incorporation, were paid, either by Church or Clarke; but this had no tendency to show an assumption of the amount now in controversy by such corporation.

An agreement of this kind, if actually made, would have been a fraud upon the corporation, and especially would it have been a fraudulent and forbidden transaction as to the other shareholder, Mrs. Clarke. The two officers before mentioned, of defendant corporation, could not divert its assets from their legitimate purposes, that one or both might be benefited. The corporation had no in-

terest in the payment of Ross Clarke's debt. It had received no consideration for the attempted assumption; and the holder of 48 of the 50 shares of its capital stock could not be plundered by the consummation of such a scheme.

Nor is there a particle of merit in the contention of plaintiff's counsel that, because Mrs. Clarke failed to disapprove the assumption of her husband's indebtedness within a reasonable time after she should have discovered or known of it had she exercised ordinary diligence or prudence respecting the corporate affairs, she is bound by such assumption as fully as if it had been duly authorized by the board of directors upon a full and adequate consideration. Ordinary prudence and diligence in regard to the affairs of the corporation would not have disclosed the fact that the two persons who were managing its business had entered into such an agreement, for it existed entirely in the verbal understanding before mentioned. It was in the minds, perhaps, of those who participated in the conversation, and no one would demand of Mrs. Clarke that she search it out from these receptacles. Nothing appeared upon the books kept by Church which would inform her of such a transaction.

As before stated, Mrs. Church had been credited \$50 each month, in what was known, on the books kept prior to the incorporation, as the "investment account," and the total of this credit amounted to \$600 when the articles were signed. Thereafter, and for the next six months, the credit was given to Mrs. Church in the same account. Nothing more or different in reference to the matter was entered on the books of the corporation; and, had Mrs. Clarke made a critical examination of these and other entries on the books, she would have discovered, at most, that Mr. Church was being paid a salary of \$125 per month, of which \$50 was being credited to Mrs. Church each month, and that this had been done monthly for one year prior to the incorporation. In no way would this convey to her the slightest knowledge of the alleged assumption of her husband's liability or indebtedness.

Summing up the situation then, and according to counsel's assertion that Mr. Church was working on a salary for Mr. Clarke, that a complete and perfect assignment of the sum of \$600 was

made to this plaintiff, and that the right of action accrued prior to the bringing of this suit, we find that the assets of the concern, doing business for one year prior to November 1, 1896, belonged solely to Ross Clarke; that neither Mr. nor Mrs. Church had any lien upon any part thereof, but that one or the other had a personal claim against him, growing out of the contract, and nothing more; that the latter had the right and power to convey these assets as he pleased; that he did convey to the corporation; and that there was no evidence upon which to base a finding of an assumption by the latter, founded upon a consideration or otherwise.

We must conclude that that part of the verdict which represented the \$600 claim was not justified. It was without evidence to support it.

We will now refer, briefly, to the evidence on which must have been based that part of the verdict which represents the amount due on account of salary earned by Mr. Church subsequent to the incorporation. That he was one of the stockholders, and also acting as president of the corporation, would not prevent his receiving a salary for his services; but he could not use his position to his own advantage, or to the disadvantage of the corporation when dealing with it; nor could he bind the latter to pay him a greater salary than his services were fairly and reasonably worth, and the court so charged the jury.

There was evidence from which the jury was warranted in finding that Ross Clarke represented Mrs. Clarke in managing the corporate business, and also that, after the corporation was formed, he agreed that Church should receive a monthly salary of \$125 per month, of which \$50 should be credited to the plaintiff. Mrs. Clarke knew that Church was working for the corporation, and, as before stated, the account books showed that he was being paid \$75 per month in cash, on account of salary, and that his wife was being credited with \$50 each month on the same account. These books were open to Mrs. Clarke, and, in the exercise of ordinary diligence and prudence, it was incumbent upon her to examine them within a reasonable time, or she would be bound by their contents in respect to Church's salary. Looking at the evidence

from either standpoint, it supports the verdict as to all in excess of \$600 and interest thereon.

This disposes of the assignments of error in relation to the merits of the case, but there are several assignments as to rulings made upon the trial, and as to the charge. But one of these needs consideration. Against defendant's objection, Mr. Church was permitted to relate private conversations had with his wife, the plaintiff, at their home, in respect to an incorporation of the business, the legal effect it might have upon her claim under the contract, and upon his earnings thereunder in the future, in which conversations he told her that he was to receive, and was receiving, the same compensation from the corporation as he had from Mr. Clarke. All of the conversation was hearsay, and ought not to have been received for any purpose; and that which bore upon what salary he was to receive, or was actually receiving, from the defendant, was so objectionable that the assignment of error as to the same was well taken.

The order denying a new trial is reversed.

ADELAIDE C. MAXFIELD v. CHANNING SEABURY.

December 21, 1898.

Nos. 11,411—(163).

75	93
81	328

Construction of Contract—Trust.

A contract between plaintiff and defendant, under which the former furnished money to the latter, to be, and which was, used in a certain mercantile business, construed. *Held*, that under its provisions defendant occupied a quasi trust relation as to plaintiff and in the care and use of said money.

Same—Annual Balance Sheet—Embezzlement by Cashier—Proportionate Share of Loss.

The contract provided that at the end of each calendar year an account of the firm liabilities and property was to be taken, and a balance sheet made out and submitted to plaintiff, and, unless she should object within 10 days, such sheet was to "be conclusively deemed to be correct to all intents and purposes." Such sheets were submitted at the end of each

year from 1891 to 1894, inclusive, and no objections were made. In 1895 it was discovered that during each of these years the cashier of the concern had appropriated money to his own use belonging to his employers, but the amount taken in any one year could not be ascertained. *Held*, that the clause above quoted from the contract could not be construed so as to prevent defendant from charging up to plaintiff's account in 1895 her pro rata share of the total amount of money taken.

Same—Successive Firms—Plaintiff not Chargeable with Proportion of Thefts from Former Firm.

Prior to the making of the contract, plaintiff's husband, his nephew, and defendant were co-partners in the mercantile business, and had in their employ the same cashier. His bad conduct commenced in 1888, while in their employ. Defendant bought out, for a lump sum, the interest of plaintiff's husband in the firm and its business, and he withdrew from the firm. *Held*, that under these circumstances defendant could not charge plaintiff with any part of the money stolen from the old firm, when submitting his balance sheet for the business of 1895.

Action in the district court for Ramsey county to recover \$1,070.54, under the terms of the agreement mentioned in the opinion. The cause was tried before O. B. Lewis, J., without a jury, who ordered judgment in favor of defendant. From an order denying a motion for a new trial, plaintiff appealed. *Reversed*.

John F. Fitzpatrick, for appellant.

Warner, Richardson & Lawrence, for respondent.

COLLINS, J.

There is very little dispute over the facts in this case, and all need not be stated in this opinion.

1. It was found by the court that, according to the books of account kept by the old firm of Maxfield & Seabury, the interest of Louis H. Maxfield in the firm and in its business was of the value of \$47,478.41, and that this was the amount which Seabury then and there agreed to pay Maxfield for his interest, the latter to withdraw from the firm. The agreement was consummated. Maxfield was paid \$5,000 in cash December 5, 1890, and the balance of the amount agreed upon was evidenced by Seabury's notes, in different sums, all payable to Maxfield's order within one year, without interest. The transaction then stood completed as between Maxfield and defendant.

The new firm, composed of Seabury and W. T. Maxfield, under the firm name of Seabury & Co., was formed at once, and was continued during the years hereinafter mentioned. Seabury's notes were then indorsed and transferred by Maxfield to his wife, the plaintiff, but this was wholly without consideration. She was not an innocent purchaser for value.

2. The contract, made a part of the complaint, between the plaintiff and the defendant, was dated February 21, 1891, but was to take effect as of January 1, 1891, for two years. At the end of 1892 it was renewed for two years, and at the end of the year 1894 it was again renewed for one year. It recited that Seabury had received \$40,000 of the plaintiff's money, by him to be invested in his own name in the firm business, and to be handled and finally accounted for as specified in said contract. It was provided in the second section that:

"At the end of each calendar year during continuance of this contract an account is to be taken of all the liabilities of said firm, and of all its property at the then current cash value thereof; and at the same time the net profit or net loss, if any, which shall have accrued from the business done by said firm during the next preceding twelve months shall be computed, estimated and agreed upon; and thereupon a balance sheet shall be made out and delivered to said Adelaide C. Maxfield, and, unless the same be objected to by her within ten days thereafter, the same shall thereupon be conclusively deemed to be correct to all intents and purposes."

The next section provided that, in case of an actual net loss in the business during the year for which a balance sheet had been rendered, one-tenth of such net loss should operate as a payment by Seabury, to that extent, upon the \$40,000, the residue only to be accounted for to plaintiff. If a net profit had accrued, it was to be divided pro rata according to the amount of capital invested, up to 8 per cent. thereon. If the profit exceeded this per cent. plaintiff was to receive a further sum equal to one-tenth of the excess. The fourth, sixth and eighth sections were as follows:

"(4) At the end of the year 1892, unless this agreement shall then be renewed for some further period, said Seabury shall account for and pay over to said Adelaide C. Maxfield all that portion of said sum of forty thousand dollars (\$40,000) received by him from her,

as above stated, which portion then remains invested in said business; and the amount then coming to said Adelaide C. Maxfield hereunder shall be by said Seabury paid to her in monthly installments of five thousand dollars (\$5,000) per month, until the same is fully paid."

"(6) Said Adelaide C. Maxfield is not to be a partner in said firm or business, nor is she to have any of the rights, powers or privileges of a partner therein; and during continuance of this contract said Seabury shall be under no personal obligation with respect to the sum of forty thousand dollars (\$40,000) as herein mentioned, further or otherwise than as herein mentioned, but he shall and will keep said moneys invested as aforesaid, and handle such moneys with the same care and attention as he does with respect to his own capital invested in said business."

"(8) This agreement is made to take effect and be in force as of, from and after January 1, 1891, and the said sum of forty thousand dollars (\$40,000) first herein mentioned is to be deemed invested in said business as of, from and after that date."

3. At the end of each year up to and including 1894, defendant made out and furnished the balance sheets mentioned in section 2, and no objection was made to either by plaintiff, although the yearly net profit seems to have been much less than 8 per cent.

In 1895 it was discovered by the firm that their cashier, Smith, had been stealing from his employers from the year 1888, his peculations, when discovered, amounting in the aggregate to over \$11,000, of which amount he returned \$7,000. When making the final balance sheet to plaintiff for the year ending December 31, 1895, defendant sought to surcharge her account with \$1,070.54 as her share of the amount stolen, to which she objected, and this lawsuit resulted, in which plaintiff is attempting to recover said sum, defendant having accounted for the remainder of her investment.

4. Smith's appropriation of money commenced more than one year prior to the dissolution of the old firm, in 1890, and continued down to the day it was detected, in 1895. The amount taken in any particular year could not be ascertained from the evidence, according to the findings, and as a conclusion of law the court below held that this was not material, for the purposes of this action, so long as the aggregate amount taken from both firms was determined. The effect of this conclusion was that, as against plaintiff's

claim under the contract, there could be offset that part of the amount taken from the old firm by Smith.

5. It appears that the sale made by Maxfield to Seabury in December, 1890, and the withdrawal of the former from the firm of Maxfield & Seabury, was brought about by a course of outside speculation indulged in by L. H. Maxfield, which was regarded as inimical to the business, and consequently to the interests of Mr. Seabury and Mr. W. T. Maxfield, his partners; and that Seabury offered, and Maxfield accepted, as the consideration, the amount which, from the books of the concern, appeared to be the value of Maxfield's interest in the firm and its business, January 1, 1890, all parties believing that the books had been honestly and fairly kept, and that Mr. Maxfield's actual interest was properly shown therein. It was, in fact, a lump sale, no effort being made to ascertain his real interest. It was made in good faith upon the part of all concerned, and, notwithstanding the thefts which had theretofore been committed by Smith, Maxfield's interest might have been of much greater value than the amount paid, or it might have been of much less value. There was no attempt to mislead, no false representation, and no warranty as to the real value of Maxfield's interest. Both parties acted upon their belief as to the firm books in ignorance of Smith's thefts, wholly excluding any consideration of profits or losses of the 1890 business.

It is probable that upon a sufficient showing the defendant might have a right to rescind the transaction of December 5, 1890, upon the ground of mutual mistake of fact, the unavoidable and natural result of the ignorance of both parties of Smith's bad conduct; but he cannot be allowed to retain the benefits of his bargain, if there were any, and at the same time demand restitution for losses which occurred before he purchased, but which were unknown at the time. This would result in injustice to the party of whom the demand was made, for it would enable defendant to avoid a contract as to those parts which would work him an injury, and affirm it as to those which would be profitable to him.

A mistake, in order to afford ground for rescission of a contract of sale, must have been mutual as to a material fact connected

with the subject-matter of the contract, and both parties must be placed in statu quo. Rescission must be entire or not at all.

So, on this branch of the case, it must be held that as to all or any of Smith's appropriations prior to the sale by L. H. Maxfield and his withdrawal from the old firm, the defendant had no right to assert a claim against the plaintiff.

6. This conclusion leads to a reversal of the order appealed from, but, as a new trial must be had, further consideration of the case seems necessary.

Plaintiff's counsel characterizes the furnishing of the money to defendant as a loan to the latter; but it was not a loan. Taking the contract as a whole, it is apparent that, as between the parties, Mr. Seabury occupied a quasi trust relation in respect to the \$40,000. He was to use it in the firm business as part of his own capital, was to handle it with the same care and attention as he used in handling his own money invested in the concern, was to account annually for a fixed share of the net profits, if any, and, if the business was conducted at an actual loss, the plaintiff was to suffer to the extent of one-tenth part thereof, no matter how great the loss might prove to be. This required of Seabury due care of the firm affairs and of the business in which the plaintiff's money was invested. He could not be negligent, and escape liability. And the court found as a fact that in the transaction of such business the defendant had exercised ordinary care. The correctness of this finding is not questioned.

So, with reference to a new trial, we are brought to a consideration of the claim of plaintiff's counsel that, each of the balance sheets submitted by defendant at the end of each year, not having been objected to by plaintiff, was final and conclusive upon both parties under the contract, the language of which—the latter part of section numbered 2—will be remembered. If these sheets were final and conclusive, the defendant could not charge plaintiff with any part of the moneys taken prior to January 1, 1895.

We have no doubt that the parties might have made a contract which would have covered a loss of the nature of that herein involved, but the question is whether they have made such a contract. The language employed is that a balance sheet made out

by defendant and submitted to plaintiff shall, if not objected to by her within 10 days, "be conclusively deemed to be correct to all intents and purposes." This is not as clear an expression of the parties' intent as it might have been, and the language must be construed with reference to the circumstances for the purpose of ascertaining whether it was designed that the balance sheet should be absolutely final and conclusive when held by plaintiff, without objection, for 10 days.

A balance sheet is nothing more or less than a summation and balance of accounts. It states and shows in a concise manner what is stated and shown by the books of account. It briefly exhibits their contents. It does not purport to be a true statement of the actual condition of affairs in a mercantile house, but a summary of what the books disclose the condition to be. Certainly, it was never intended by the parties that the balance sheets provided for should exhibit the real condition of the business, for that would be impossible while the house was giving credit. It was intended and expected that as to ordinary commercial transactions, such as may usually be anticipated in the business, the balance sheets should be full and accurate, and that they disclose affairs according to the usual course of business, and that all losses known to have occurred when any particular sheet was submitted to plaintiff should then be taken into consideration, made known and accounted for. As to these matters, these sheets were to be conclusive, deemed as correct unless objection was made, and in all probability final and conclusive as between plaintiff and defendant.

But the loss for which defendant sought to protect himself in this instance, to the extent of what he alleged was plaintiff's share, was not of the character to be anticipated in the usual course of business, nor was it a loss which could appear upon the books or in a balance sheet, until discovered. It could not have been contemplated when the contract was drawn, nor should we expect anybody to guard against it. Surely, the somewhat indefinite phrase heretofore quoted from the contract—merely a provision that for all intents and purposes the balance sheets should be deemed to be correct—would have to be very liberally construed in order to hold that with such an unusual and unexpected loss as this

was, and under all circumstances, each balance sheet was final and conclusive upon both parties, and that the real facts could in no manner be questioned after the expiration of the 10-day period.

We are of the opinion that when making and submitting the balance sheet for 1895 the defendant could properly surcharge plaintiff's account with her pro rata portion of the amount stolen by Smith subsequent to the date of the contract.

Order reversed, and a new trial granted.

CANTY, J.

I concur. Under the agreement between plaintiff and defendant, the annual account was, after the 10 days, conclusive as to all matters except something so extraordinary and unusual that it must be said the parties never anticipated anything of the kind, and never had it in their minds, when making the contract, to make the account conclusive as to such a matter.

**FORT DEARBORN NATIONAL BANK v. FRANK A. SEYMOUR and
Another.**

December 22, 1898.

Nos. 11,289—(156).

Bank—Pledge of Credit—Former Opinion Followed.

Former opinion, in 71 Minn. 81, adhered to.

Fraud of Plaintiff Injurious to St. Paul Bank.

On the additional or different facts appearing on the second trial, *held*, the fraud of plaintiff injured the St. Paul Bank, although the latter honored the check drawn by the land company in favor of the Stillwater Bank, before plaintiff discounted the new note of the Land Company.

Discount of Note—Finding of Court Sustained by Evidence.

Held, further, the trial court was warranted in finding that the St. Paul Bank did not first discount the note, and then rediscout it with plaintiff, although, before the cashier of the St. Paul Bank sent the note to plaintiff, he entered the amount of the same on the books of his bank as a credit to the Land Company, and prematurely, and without right to do so, charged the same amount to plaintiff.

Same—Fraud of Cashier of St. Paul Bank not Ratified—Negligence.

Held, further, conceding without deciding, that, if plaintiff had acted innocently, the evidence would be sufficient to show conclusively that the St. Paul Bank ratified the transaction of its cashier with plaintiff, yet, as the latter acted fraudulently, the St. Paul Bank has not ratified the transaction, even though its officers and stockholders were negligent in failing to discover the real character of the transaction, which plaintiff intended to conceal from them.

Action in the district court for Ramsey county to recover \$5,808.59. After the decision upon the former appeal herein, 71 Minn. 81, the cause was tried before Bunn, J., who ordered judgment for defendants in the sum of \$435.36, being the amount of the insolvent bank's deposit with plaintiff, less the sum of \$29,116.16 due to plaintiff from the insolvent bank, and less the sum of \$5,808.59, the proceeds of collections made by defendants. From an order denying its motion for a new trial, plaintiff appealed. Affirmed.

Morphy, Ewing & Gilbert and Flower, Smith & Musgrave, for appellant.

Young & Lightner, for respondents.

CANTY, J.

This is the second appeal in this action. On the first trial the court found for the plaintiff bank, and we held that the evidence would not sustain a judgment in its favor. For a statement of the facts appearing by the evidence on that trial, see opinion on former appeal, 71 Minn. 81, 73 N. W. 724. On the second trial the court found for defendants, and plaintiff appeals from an order denying a new trial.

Appellant contends that the evidence will not sustain a judgment for defendants.

On the second trial the evidence was in some respects materially different from what it was on the first trial. And in discussing the evidence given on the second trial it must be remembered that the question now is, not whether that evidence would sustain a judgment for plaintiff, but whether it will sustain a judgment for defendants. It may be that this evidence would sustain a judgment for either party, and that the finding of the trial court for the defendants should be sustained. It was fairly to be implied from the

evidence on the first trial that the check given by the Gladstone Land Company in payment of its note to the Stillwater Bank was not paid by the Bank of Minnesota until after the arrangements were made by William Dawson, Jr., with plaintiff to take the new note of the Land Company, and that the Bank of Minnesota then paid the check on the faith of these arrangements. But it appears by the evidence on the second trial that this check was paid before any such arrangements were made.

On the afternoon of July 12, 1893, Bronson, the cashier of the Stillwater Bank, appeared in St. Paul after banking hours, and presented the note to Dawson, Jr., as treasurer of the Land Company, for payment. Thereupon Dawson, Jr., as such treasurer, drew a check on the Bank of Minnesota for \$25,019.44 in favor of the Stillwater Bank, delivered the check to Bronson, and received from him the notes of the Land Company. Bronson immediately indorsed the check, and handed it back to Dawson, Jr., as cashier of the Bank of Minnesota, to be deposited in that bank to the credit of the Stillwater Bank, as the latter bank kept an account in the former. On the next day the amount of this check was credited to the latter on the books of the former, and the Land Company was charged with the same amount. At the same time Dawson, Jr., drew up the note from the Land Company to the plaintiff, mentioned in the former opinion, had the same signed by the sureties, sent it to plaintiff at Chicago, and then charged the amount thereof to plaintiff on the books of the Bank of Minnesota, and credited the same amount to the Land Company on these books. These things were all done on July 13. The plaintiff received the note of the Land Company on the 14th, and on the same day wrote Dawson, Jr., as cashier of the Bank of Minnesota, the letter set out in the former opinion. Dawson, Jr., received this letter on the 15th.

The trial court found that Dawson, Jr.,

“Acting for himself and for said land company,”

sent the note to plaintiff with a request that plaintiff discount it. This amounts to a finding that he was not acting for the Bank of Minnesota when he thus sent it.

But appellant contends that it conclusively appears from this evidence that the Land Company first discounted the note with the Bank of Minnesota, that the latter then rediscounted it with plaintiff, and that, therefore, the Bank of Minnesota was not, as held in the former opinion, a mere accommodation surety for plaintiff.

We cannot agree with appellant. The letter of Dawson, Jr., to plaintiff stated that he was interested in the Land Company, and did not want to borrow the money from his own bank. This part of the transaction tends to prove that the note had not already been discounted with that bank. True, before the note was sent to plaintiff, the amount of it was entered on the books of the Bank of Minnesota as a credit to the Land Company, but it was at the same time charged to plaintiff, so that the transaction appeared on these books to be, not a discount of the note, but a remittance by plaintiff to the Bank of Minnesota of \$25,000 to be placed to the credit of the Land Company.

Appellant also contends that on the foregoing facts it cannot be held that the Bank of Minnesota ever parted with anything on the faith of the arrangements made with plaintiff to discount the note of the Land Company, and that, therefore, whether these arrangements were fraudulent or not as to the Bank of Minnesota, they did not injure that bank, and, if it was not injured by the alleged fraud, plaintiff is entitled to retain the \$25,000 placed in the inactive account as the proceeds of the discounted note.

We cannot hold that the Bank of Minnesota was not injured by the secret agreement of Dawson, Jr., whereby, as security for the note of the Land Company, he pledged this \$25,000 so placed to the credit of the latter bank in the inactive account carried by it in the plaintiff bank. With respect to the secret and fraudulent part of the agreement between plaintiff and Dawson, Jr., he did not represent the Bank of Minnesota. Again, he acted for both the Land Company and the Bank of Minnesota in assuming to pay the Stillwater Bank out of the overdrawn account of the Land Company in the Bank of Minnesota. That transaction was voidable as to the latter bank if it acted promptly.

The trial court was warranted in finding that it would have acted promptly, and avoided that transaction, or would have compelled

the Land Company to make good the \$25,000 so drawn out by the Stillwater Bank, if it were not for the fraud of the plaintiff in making it appear that the \$25,000 so drawn out was made good by depositing with the Bank of Minnesota the proceeds of the new note, which plaintiff pretended it had discounted for the Land Company.

By the agreement between plaintiff and Dawson, Jr., it appeared, and was intended to appear, that the Land Company had received \$25,000 from plaintiff, that this was to be paid to it by the Bank of Minnesota, and to compensate the latter bank therefor the same sum was placed to its credit in the inactive account in the plaintiff bank. In this way the \$25,000 was supposed to be transmitted from plaintiff to the Land Company. This was the statement spread on the books of both banks, and which both Dawson, Jr., and plaintiff intended should be spread on the books of the Bank of Minnesota for the inspection of its stockholders, directors, customers and the bank examiner. True, a thorough search among the papers of the latter bank might have brought to light the correspondence between plaintiff and Dawson, Jr., showing that the \$25,000 in the inactive account was pledged for the payment of the note.

But the trial court was fully warranted in finding that it was the intention and expectation of both plaintiff and Dawson, Jr., that this correspondence would not and should not be brought to light; that the Bank of Minnesota should appear to every one except plaintiff and Dawson, Jr., to have a cash reserve of \$25,000 which it did not have, and in the Bank of Minnesota the Land Company should appear to have a credit of \$25,000 which it did not have.

Plaintiff's agreement with Dawson, Jr., amounted, in effect, to a conspiracy with him, not only to cause these false appearances, but to keep them up for more than three years and five months, until the Land Company and every one connected with it had become insolvent. Then we are of the opinion that the Bank of Minnesota was injured by the fraud.

Appellant claims that it conclusively appears that the Bank of Minnesota ratified the transaction between Dawson, Jr., and plaintiff. It appeared on the second trial that two of the directors of the Bank of Minnesota, who were not interested in the Land Com-

pany, knew for a long time that the \$25,000 so placed in the inactive account could not be drawn out of plaintiff's bank, but they did not know why it could not be drawn out. This evidence might have had considerable weight if it were not for the fact that it is very common for a bank to deposit a certain specified amount of its funds in an inactive account in its correspondent bank for a legitimate purpose, usually to secure obligations arising on current transactions.

Appellant contends that said knowledge of the directors, and the correspondence between the banks, taken with the entries made on the books of the Bank of Minnesota during the three years and five months during which the transaction was continued, conclusively proves that the Bank of Minnesota ratified the act of its cashier in pledging the \$25,000 as security for the payment of the note of the Land Company.

Conceding, without deciding, that a reasonably careful scrutiny of this correspondence and these entries would have put the latter bank on inquiry so as to make it chargeable with knowledge of the act of its cashier in so pledging these funds, yet, in our opinion, that is not sufficient in this case. If the cashier had acted fraudulently, or beyond his authority, and plaintiff had acted innocently, such evidence of ratification might be conclusive.

But plaintiff did not act innocently. It is very plain from the letter of Dawson, Jr., at the very inception of the transaction between him and plaintiff, that he intended to use the funds of the Bank of Minnesota for the benefit of his private enterprises, without having it so appear on the books of that bank. He proposed to do this indirectly with the aid of plaintiff, and the latter knowingly agreed to aid him, and did so aid him in the scheme. As such practices have become very common, it may be that plaintiff's cashier did not know that he was participating in the commission of a fraud, so as to make his own bank liable; but his ignorance of the law is no excuse. It is fair to presume that he was a business man of sufficient discernment to see that Dawson, Jr., had adopted this roundabout way of loaning the funds of the Bank of Minnesota to the Land Company for the purpose of concealing the real transaction from the other officers of his bank, and that, in order to accom-

plish his purpose, he was willing to loan these funds at 4 per cent. per annum, while the Land Company paid 6 per cent., 2 per cent of which went to plaintiff for the part it played in the scheme. Then plaintiff intended to aid Dawson, Jr., in deceiving his own bank, and should not now complain because the other officers and the stockholders of that bank did not discover what plaintiff intended they should not discover. If plaintiff entered into a scheme to defraud the Bank of Minnesota, it is no defense that such stockholders and other officers were negligent in failing to discover that fraud.

Some of appellant's proposed amended findings of fact which the court below disallowed were findings as to evidentiary matters which were not conclusive, and the others were in conflict with the findings already made, so the court did not err in refusing to find the same.

This disposes of all the questions raised having any merit, and the order appealed from is affirmed.

HOYT A. AVERY v. SYLVESTER STEWART.

December 22, 1898.

Nos. 11,302—(162).

Farm Contract—Title of Crop in Owner—Action for Conversion—Evidence.

A contract for farming on shares provided that the title and possession of the crops raised should remain in the owner until division. In an action of trover brought by such owner against a third person for the conversion of wheat raised under the contract and disposed of by the occupier, *held* it conclusively appears by the evidence that there had been no division, and that such occupier took away and disposed of a part of the share of such owner.

Same—Title.

Held, further, until division, the title to all of the grain remained in such owner as security that he would not be wrongfully deprived of his share by the occupier, and he is entitled to recover.

Action in the district court for Stevens county to recover \$391.25, for the conversion of 546 bushels of wheat by defendant. The

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cause was tried before C. L. Brown, J., and a jury, which rendered a verdict for \$311.61 in favor of plaintiff. From an order denying a new trial, defendant appealed. Affirmed.

H. T. Bevans and *James I. Best*, for appellant.

Geo. E. Darling, for respondent.

CANTY, J.

On February 1, 1897, a certain savings bank was the owner of a certain section of land in this state, on which there were 400 acres of land under cultivation. On that day the bank entered into a contract with one Dolven, whereby he agreed during the following spring to sow 350 acres of the 400 to wheat, and the other 50 acres to oats, to harvest and thresh said grain, and furnish all machinery and labor therefor. It was further agreed that the bank was to retain all the wheat grown on an average 50 acres of the 350 acres of wheat, and one-half the wheat grown on the other 300 acres; Dolven to have the other half, and all of the 50 acres of oats, on the full performance on his part of all the conditions of the contract. It was further provided that, until division of the grain, he could not remove any of it, and until such division the title and possession of all of the grain should remain in the bank. In May of that year the bank assigned this contract to plaintiff.

Dolven sowed, harvested and threshed the grain. He subsequently removed and sold some of the wheat to defendant, and plaintiff brought this action for the conversion of the same. On the trial, the court ordered a verdict for plaintiff, and, from an order denying a new trial, defendant appeals.

The only point urged is that, on the evidence, the jury were warranted in finding a verdict for defendant, and therefore the court erred in ordering a verdict for plaintiff. We cannot so hold. The sale and delivery of the wheat to defendant was conclusively proved, and the value of it was admitted. As a defense, defendant introduced evidence tending to prove that, at the time of threshing, Dolven divided all of the wheat into two equal parts, and put one part in a bin in the granary for plaintiff, and the other part in another bin for himself; that he subsequently hauled the part intended for plaintiff to the elevator, as provided by the contract,

and delivered it there for plaintiff, and he hauled off and sold as his own the other half of the wheat.

It was also proved that plaintiff's agents were present at the time of the threshing of a part of this wheat, and assisted in so dividing such part. But it did not appear what authority these agents had, or that they had authority to give away or deliver to Dolven, as his own, one-half of the wheat, when, under the contract, plaintiff was entitled to four-sevenths of it. Neither does it appear that these agents ever intended to give Dolven one-half of all the wheat, or that they had authority to, or intended to vest in Dolven the title to any of the wheat, until the division of all of it was completed in the proportions specified in the contract.

In *Anderson v. Liston*, 69 Minn. 82, 72 N. W. 52, we held that while the owner and occupier of the land were, under such a contract, tenants in common of the crops, the title to the crops remained in the owner as security for the performance of the contract on the part of the occupier; and it may be added that, until division, the title to the whole remains in the owner as security that his own share will not be wrongfully withheld from him by the occupier.

In our opinion, the evidence was conclusive that there had been no division, that plaintiff was deprived of a part of his share, and that such part is greater than the amount received by defendant. Therefore the court did not err in ordering a verdict for plaintiff.

Order affirmed.

An application for a reargument having been made the following opinion was filed January 31, 1899:

CANTY, J.

The motion for a reargument is denied.

In the closing words of the opinion we inadvertently stated that the evidence is conclusive that plaintiff was deprived of a part of his share of the wheat, which part is "greater than the amount received by defendant." This statement is not warranted by the evidence. But, in our opinion, the burden was on the defendant to show the total amount of wheat raised on the land, so as to show

what amount was plaintiff's share. Defendant did not maintain this burden.

The evidence on behalf of defendant was directed mainly towards proving a division of the wheat into two equal parts. Evidence was given that each of three certain men employed by plaintiff kept tally at the threshing machine of the amount of wheat threshed, while he was present. Dolven testified that those three men checked a total of 2,425 bushels, but his testimony cannot, in our opinion, be fairly construed to mean that this was all the wheat raised on the farm.

In order to divest the legal title of the landlord or owner to the tenant's share of the wheat, the latter must properly account for all the wheat raised on the farm. We cannot hold that he has done so, by the ambiguous evidence given by him in this case. The defendant stands in no better position than would such tenant or occupier if the action was brought against the latter.

IRMA MUELLER v. CHICAGO, BURLINGTON & NORTHERN
RAILROAD COMPANY.

December 22, 1898.

Nos. 11,313—(176).

Railway—Mileage Ticket—Unlawful Use—Question for Jury.

Plaintiff bought a mileage ticket from defendant with the funds of a ticket scalper, paid the scalper for the mileage used on one trip, and deposited the remainder of the mileage with him on her return. Thereafter he permitted another to use a part of the remaining mileage, contrary to the terms of the contract with defendant, which contract provided that for such use the ticket should be forfeited. Thereafter plaintiff undertook to use the remainder of the mileage on another trip, when it was taken up, and she was compelled to pay fare, under threat of being put off the train. She testified that, by the terms of her agreement with the scalper, she was to use the ticket, and pay him for each trip as she used it, and he and she testified that he had no authority from her to permit others to use it. *Held*, on the evidence and circumstances, it was a question for the jury whether she or the scalper owned the ticket, and, if she owned it, whether she had authorized the scalper to permit others to ride

on it. *Held*, further, if she owned the ticket, and he had no such authority, the ticket was not forfeited.

Same—Verdict Excessive.

Held, the damages awarded for threatening to put her off the train, and compelling her to pay fare, are excessive.

Action in the district court for Hennepin county to recover \$2,034.10. The cause was tried before Johnson, J., and a jury, which rendered a verdict for \$213.01 in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Modified.

Young & Lightner, for appellant.

F. A. Gilman, for respondent.

CANTY, J.

The plaintiff boarded defendant's railroad train as a passenger, and presented, in payment of her fare, a mileage book or ticket which had been issued to her, but the conductor claimed that the book had been forfeited because another had been allowed to use it contrary to its terms. He retained the book, and demanded that she pay her fare or be put off the train. She then paid it in money, and rode to her destination. She brought this action to recover damages claimed by reason of the foregoing facts, and had a verdict for \$213.01, which, on a motion for a new trial, the court reduced to \$123.21, as a condition of denying the motion. Plaintiff consented to the reduction, and defendant appeals from the order denying a new trial.

1. The ticket in question was a 2,000-mile ticket. In May, 1896, plaintiff was about to make a trip from Minneapolis to Chicago and return. She applied to T. C. Shove, a ticket broker or scalper. The cost of the 2,000-mile ticket was \$50, with the right to a return of \$10 when the ticket was used up. Shove gave her \$35, and an unused portion of an old ticket, which she took to defendant's ticket office, and received therefor the ticket in question, the agent allowing her \$15 for the unused portion of the old ticket. She then rode on the new ticket to Chicago and return, using 804 miles of the mileage. She then delivered the unused portion of the ticket to Shove, and paid him \$17 for the part she had used.

On January 29, 1897, she again went to Shove's office, and he gave her what remained of the ticket, but, in the meantime, another person had used it for a trip to Chicago and return, using 804 miles more, leaving only 392 miles of mileage in the ticket. This lacked 10 miles of being sufficient to take her to Chicago, so she took it to the ticket office, and paid 42 cents for the balance of her fare, retaining the mileage. She also purchased a sleeper ticket. She boarded the train, and between Minneapolis and St. Paul, the conductor took up the mileage ticket, and declared that it was forfeited. A part of the contract printed on the ticket, and signed by her, reads as follows:

"The right to obtain transportation at a reduced rate, in accordance with the terms of this ticket, is a privilege personal to the person to whom it is issued, whose signature appears hereon, and who is the only lawful holder, and this ticket and the attached mileage strip are not transferable, and no person other than the lawful holder has or can obtain any rights, title or property whatever herein; and if this ticket, or any portion of the mileage strip, is or is attempted to be sold, transferred or given away, or if it be presented in any other manner than as herein provided, or if it be found in the hands of any other person than the lawful holder, it shall have no value whatever, and shall be forfeited, and may be taken up when found by any agent or any of the companies over whose lines it is issued."

As the mileage was sold for two cents a mile, much less than regular rates, this forfeiture clause was reasonable and valid. In order to avoid the effect of this clause, plaintiff claimed she did not authorize Shove to permit any one else to use the mileage. Plaintiff testified that, by the terms of her agreement with Shove, she was to use the book, and pay for each trip as she used it, and that when she returned from her first trip to Chicago she delivered the book to him as security for the balance due on it, and that she intended to take another trip to Chicago the following fall, and use the mileage again, but failed to do so. She and Shove both testified that she gave him no authority to permit some one else to use the book. At the time of her second trip, she was called to Chicago very suddenly to attend a funeral. The ticket by its terms expired one year from the date of its issue. If it were not for this sudden call, she might have taken but one trip during the year, and neither

she nor Shove explain how they expected that, under such circumstances, he would get his money back out of the mileage without selling portions of it to other persons.

For this, and other reasons, appellant contends that the testimony is so unsatisfactory that it will not support a finding that Shove, as between himself and plaintiff, had no authority to permit others to use the mileage. We cannot so hold. True, the contract provides that, if the ticket "be found in the hands of any other person than the lawful holder," it shall be forfeited. But this forfeiture clause must be strictly construed, and, in our opinion, if the ticket was found in the hands of some one else without plaintiff's fault, it was not forfeited. If plaintiff owned the mileage, and Shove had no authority to permit others to use it, the ticket was not forfeited. But whether Shove owned the mileage, so that, as between him and plaintiff, he had a right to permit others to use it, or whether she owned it, and, if so, whether she authorized him to permit others to use it, were, in our opinion, all questions for the jury.

2. It is further contended that the damages are excessive. As the verdict now stands, it allows about \$23 for the loss of the mileage which was taken up, and \$100 for damages for what otherwise occurred at the time of taking up the mileage and compelling her to pay fare. She testified that the conductor threatened to put her off the train unless she paid fare, and was very gruff and rough about it. He also told her that she was not the Irma Mueller named on the ticket. This all occurred in the separate room or compartment occupied by her alone in the sleeping car, so that she did not have to suffer the mortification of being thus treated in the presence of other passengers. When the train arrived at St. Paul, the conductor offered to take her money and go to the ticket agent and buy her a new ticket. She gave him the money, and he bought the ticket for her.

The judge charged the jury that this is not a case for punitive damages, and we agree with him. Defendant had satisfactory evidence that the mileage had apparently been forfeited by being used by another person, had listed it with its conductors as forfeited, and this conductor acted on the instructions furnished by such list.

We are of the opinion that, under the circumstances, \$100 is excessive as compensation for the injuries in body and mind which plaintiff suffered on that occasion, and that the utmost which can be sustained is \$50.

It is therefore ordered that a new trial be granted, unless plaintiff, within 10 days after notice of the filing of the mandate herein in the court below, shall file a release of all of the verdict in excess of \$73.21. If such release is filed, then the order appealed from shall be affirmed. Under the circumstances, defendant will not be allowed statutory costs on this appeal.

WILLIAM T. BARRETT v. GREAT NORTHERN RAILWAY COMPANY.

December 22, 1898.

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Nos. 11,338—(182).

Railway—Splinter of Rail upon Side Track—Negligence—Personal Injury.

The end of one of the rails in defendant's side track was battered down, spread out and split or splintered so that it projected inward five-eighths of an inch for a distance of three inches along the rail. Plaintiff, an employee of the defendant, attempted to couple the pilot bar of an engine to a freight car, but failed to do so; and in attempting to step backward off the side track, out of the way of the slowly-moving engine, the leg of his pants was caught near the heel by said projection, and his leg was held and crushed by the wheel of the engine. *Held*, defendant was not guilty of negligence in permitting this slight projection to remain on the rail.

Action in the district court for Wright county to recover \$25,000 for personal injuries received by plaintiff while in the employ of defendant. The cause was tried before Tarbox, J., and a jury. At the close of plaintiff's evidence, the defendant's motion to dismiss the case was granted. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

F. E. Latham, for appellant.

W. E. Dodge, for respondent.

CANTY, J.

Plaintiff was a conductor on defendant's freight train. About a mile south of Granite Falls, in this state, there is on defendant's railroad a side track sufficiently long to accommodate 40 or 50 freight cars. At the time in question, plaintiff's train stopped at this side track in order to pass in upon the same, and let another train pass by on the main track. Plaintiff opened the switch, and his train passed in to where there were some freight cars standing ahead of the engine on the side track. It was necessary to couple the first of these cars onto the head end of the engine, so that they could be pushed down further on the side track, out of the way of plaintiff's train, in order to give it sufficient room to stand on the side track and clear the main track. As the engine approached this first car, the train was moving about a mile an hour, and plaintiff proceeded to couple the engine to the car. He stepped in between the rails, in front of the engine, and raised up the pilot coupling bar, which ordinarily rests on the middle of the pilot. This bar is about 5 feet long, and weighs about 100 pounds. As the train moved forward he attempted to put the end of the pilot bar into the aperture in the drawbar of the car, but missed it, and the end of the bar glanced off and struck against the wooden drawhead of the car as the pilot of the engine closed in against the car. He instantly stepped back, and attempted to get out of the way, outside of the rail. He stepped backward with his left foot over the rail, but his right foot was caught and run over by the first wheel of the engine before it was stopped. The foot was crushed at the ankle, and had to be amputated. He brought this action to recover damages for this injury. On the trial the court dismissed the action at the close of plaintiff's case, and he appeals from an order denying a new trial.

Plaintiff testified that, as he attempted to draw his right leg over the rail, he felt that his foot was caught and held so that he could not pull it away before the wheel passed over it. He did not know what it was that held his foot. There is evidence tending to prove that the foot was crushed at the rail joint. The space between the ends of the rails was about three-fourths of an inch wide, and a piece of the bone of the leg was forced down into this

space. The end of one of the rails was battered down, spread out and split or splintered so that it projected inward from one-half to five-eighths of an inch for a distance of about three inches along the rail, and a piece of cloth was found sticking on this projection. It was found that a piece of the leg of the pants, near the heel, was torn out. This piece, it is claimed, corresponds to the piece found stuck in the projection on the rail.

It is claimed that the existence of the projection was the proximate cause of the injury, and that defendant was negligent in permitting the projection to remain on the rail in its side track, where the employees were in the habit of coupling and uncoupling cars. This is the only ground of liability on which plaintiff claims the right to recover.

We cannot hold that defendant was negligent in permitting the projection to remain on the rail. The side track in question was not used for switching to any great extent, and a railroad company cannot be expected to keep its side tracks free from every little projection which may extend out from the rails, ties and other parts of its side tracks. There are the ends of the bolts which go through the fish plates, the nuts to fasten the same, splinters from the ties, etc. It would be imposing on the railroad company too high a degree of care to require it to keep all of these little projections trimmed off so that a man would never come in contact with them, and the leg of his pants would not be caught as he moved around over the tracks.

This is in accordance with the conclusion reached in *Doyle v. St. Paul, M. & M. Ry. Co.*, 42 Minn. 79, 43 N. W. 787.

Order affirmed.

FRED M. ALLEN v. MARY E. ALLEN.

December 22, 1898.

Nos. 11,472—(168).

Gift Causa Mortis—Delivery.

The alleged donee of a gift causa mortis was a student in the office of the donor, resided with the latter, and each had a key to the office. The donor, at the residence, stated to the donee that he gave the donee all the office furniture, but did no further act to deliver the same. *Held*, it is not enough that the donee had a previous and continuous possession of the gift. There must be a delivery at the time of the donation. In this case there was no visible change of possession, by symbol or otherwise, at the time of the alleged delivery, which consisted wholly of words, and there was no valid gift causa mortis.

Action in replevin in the district court for Hennepin county against the administratrix of Charles T. Allen, deceased. The cause was tried before Lancaster, J., without a jury, who ordered judgment in favor of plaintiff for the return of the property or for \$220, if the same could not be delivered. From an order denying a motion for a new trial, defendant appealed. Reversed.

Child & Fryberger, for appellant.

L. W. Gammons, for respondent.

CANTY, J.¹

Plaintiff claims the property in question as a gift causa mortis from his half-brother, Charles T. Allen, deceased. The latter was a practicing physician in Minneapolis, who resided in one place in that city and had his office at another. Plaintiff, a medical student, spent much of his time in that office. He had one key to it, and Charles T. had the other. Plaintiff resided with Charles T.

On Sunday, December 28, 1897, plaintiff went from the residence to the office, "in the usual course of business, and was there in the ordinary way." Charles T. remained at the residence, and took a dose of morphine with intent to commit suicide. He then telephoned plaintiff, and told the servant girl:

¹ BUCK J., heard the argument, but declined to take part in the decision.

"Take a message and tell him [plaintiff] that he [Charles T.] gave all his things and instruments and books and bones and furniture in the office to his brother [plaintiff]."

Plaintiff immediately returned to the residence, and Charles T. then said to him: "I want you to have all my things in the office." Charles T. soon after became unconscious from the effects of the drug he had taken, and died the same evening. Plaintiff did not again return to the office until the following Tuesday.

Defendant, the administratrix of Charles T., took possession of said office furniture and other articles, and this action was brought to recover the same.

The case was tried by the court, a jury having been waived. The court found for plaintiff, and, from an order denying a new trial, defendant appeals.

We are of the opinion that there was no sufficient delivery of the property to plaintiff to constitute a gift *causa mortis*. In order to constitute a valid gift *causa mortis*, (1) the gift must be with a view to the donor's death; (2) it must be conditional, to take effect only on the donor's death by his existing illness; and (3) there must be an actual delivery of the subject of the donation. *French v. Raymond*, 39 Vt. 623; 3 Pomeroy, Eq. Jur. (2d Ed.) p. 1146, § 11. It is not enough that the donee had a previous and continuous possession of the gift. There must be a delivery to him at the time of the donation. *Cutting v. Gilman*, 41 N. H. 147; *Miller v. Jeffress*, 4 Grat. 472; *French v. Raymond*, *supra*; *Drew v. Hagerty*, 81 Me. 231, 17 Atl. 63; 8 Am. & Eng. Enc. 1349.

In this case there was no visible change of possession, by symbol or otherwise, at the time of the alleged donation. Plaintiff did not have possession, either actual or apparent, before, and he did not have apparent possession afterwards. The physical facts and conditions remained the same. The alleged delivery consisted wholly of words. Plaintiff's alleged possession was no more apparent afterwards than it was before. We therefore hold that there was no valid gift *causa mortis*. This renders it unnecessary to consider any other question in the case.

The order appealed from is reversed, and a new trial granted.

WILLIAM DEERING & COMPANY v. PEHR A. PETERSON and Others.

December 27, 1898.

Nos. 11,319—(58).

Description of Land Sufficient.

By comparing the description found in one part of the instrument with that found in another part, *held*, the description of the land is sufficiently definite and certain.

Seed-Grain Loan—Irregularities—Estoppel of Beneficiaries of Loan.

An applicant for a seed-grain loan, under Laws 1893, cc. 225, 226, stated in his application that he had 360 acres of land, but did not state whether or not the same was subject to any mortgage incumbrance. Those acts prohibit persons owning more than 160 acres of land, free from mortgage incumbrance, from receiving such loans. It does not appear that, in granting the application, the statute was complied with in some other respects. *Held*, the applicant having accepted the benefit of the act, he, and all those standing in his shoes, are estopped from asserting that he was not entitled to its benefits, or that the proceedings granting his application were irregular.

Laws 1893, cc. 225, 226—Title of Act.

Held, Laws 1893, cc. 225, 226, are neither of them unconstitutional because the subject of the act is not expressed in the title.

Same—Taxes—Foreclosure of Lien.

Held, the method provided for collecting the amounts so loaned by the state is not unequal taxation, or taxation at all, but a statutory method of foreclosing a statutory lien for money borrowed from the state.

Same—Appropriation of Public Money—Constitution.

Held, said acts appropriate public money for a private purpose, and are therefore unconstitutional.

Same—Estoppel of Beneficiaries with Notice.

But *held*, he who has taken the benefit of the act, and those claiming under him with actual notice, are estopped to deny the validity of the act.

Unconstitutional Statute—Presumption.

Held, it cannot be presumed that the county or its officials have complied with an unconstitutional statute.

Action in the district court for Marshall county to recover

\$103.50, the balance due on a promissory note. John Gillespie, Jr., was garnished. The board of county commissioners of Marshall county obtained leave to intervene as claimant to the property in the hands of the garnishee. Plaintiff demurred to the complaint in intervention. From an order, Ives, J., overruling the demurrer, plaintiff appealed. Reversed.

S. Cooke and Lewis E. Jones, for appellant.

The title of Laws 1893, cc. 225, 226, does not conform to Const. art. 4, § 27, under the rule laid down in *State v. Smith*, 35 Minn. 257. See also *State v. Young*, 47 Ind. 150. These chapters also contravene Const. art. 9, § 1, for the reason that the intention of the legislature, as therein expressed, was to make the collection of the money appropriated enforceable by a tax, and not by proceedings, such as would be invoked were it a debt. See *Cooley, Taxn.* (2d Ed.) 1; *Yeatman v. King*, 2 N. D. 421; *Davidson v. New Orleans*, 96 U. S. 97. The act also violates the constitution in that it appropriates public money for a private purpose. See *Cooley, Taxn.* 126. A similar statute was declared illegal in *State v. Osawkee*, 14 Kan. 418. An act is void which levies a tax for public purposes, coupled with a provision relating to taxes for private purposes. *Coates v. Campbell*, 37 Minn. 498. See also *Lowell v. City*, 111 Mass. 454; *Rippe v. Becker*, 56 Minn. 100; *State v. City*, 42 So. C. 222; *McCullough v. Brown*, 41 So. C. 220. The act also violates Const. art. 9, § 10, forbidding the loaning or giving of the credit of the state in aid of any individual, association or corporation. *Rippe v. Becker*, *supra*. See also *Loan Assn. v. Topeka*, 20 Wall. 655; *Parkerburg v. Brown*, 106 U. S. 487; *Kelly v. Seely*, 27 Minn. 385; *Wallace v. Palmer*, 36 Minn. 126.

Leo. S. Bayrell, for respondent.

The title of Laws 1893, cc. 225, 226, conforms to Const. art. 4, § 27, according to the rule announced in *State v. Cassidy*, 22 Minn. 312. See also *Board of Suprs. v. Heenan*, 2 Minn. 281 (330); *State v. Madson*, 43 Minn. 438; *Johnson v. Harrison*, 47 Minn. 575; *Henkle v. Town*, 68 Iowa, 334; *Reimer v. Newell*, 47 Minn. 237; *State v. Board of Commrs. of Red Lake Co.*, 67 Minn. 352. Certain portions

of a public act may be unconstitutional without tainting or affecting the remainder. The valid provisions will remain and be operative, while the unconstitutional provisions will have to fall. *Henkle v. Town*, *supra*; *Reimer v. Newell*, *supra*. As to appellant's contention that the act is void since it contravenes the public policy of the state to appropriate money for such a purpose, or for the state to engage in trade and the ordinary occupations of life, see *State v. Nelson*, 1 N. D. 88.

CANTY, J.

The garnishee herein disclosed that he had in his possession and under his control 144 bushels of wheat, the property of defendant. It is also to be inferred from the disclosure that defendant held the title to this wheat under a chattel mortgage given by one Herman Peterson on his crop. It appeared also on the disclosure that Marshall county made a claim to the wheat. Thereupon the board of county commissioners of that county intervened as claimant, and alleged in their complaint that on March 25, 1893, said Herman Peterson was, and ever since has been, the owner and in actual possession of certain described land in that county, on which the wheat in question was raised; that on said March 25 he applied, under Laws 1893, cc. 225, 226, for money to buy seed grain; and that the money was furnished him. The application, and all the proceedings had in procuring the money, are set out in said complaint, and the intervenors claim a lien on the wheat in question for the repayment of the money.

Plaintiff demurred to the complaint on the ground that it does not state a cause of action, and on the ground that there is a defect of parties claimant, and appeals from an order overruling the demurrer.

Chapter 225 is entitled "An act to appropriate money for seed-grain loans to farmers in this state whose crops were destroyed by hail or storms last year." The act appropriates \$75,000 out of the state treasury for such purpose, and provides that any person desiring to avail himself of the benefits of the act shall file his application with the town clerk, who shall forward it to the county auditor, who shall publish a notice that the board of county commis-

sioners will meet at his office on a day named for the purpose of considering the allowance of relief to such applicants. It is further provided that the board shall at such time fix and determine the amount to be allowed to each applicant, the county auditor shall furnish a copy of the resolution to the state auditor, and the governor, state treasurer and state auditor shall meet and distribute the appropriation among the several counties in which relief is sought. It is further provided (section 2),

"That any person or persons owning more than 160 acres of land free from mortgage incumbrance, whether the same be cultivated or not, shall be deprived from any of the benefits as set forth in this act."

The act further provides (section 3) that,

"The county auditor shall levy a tax against the land for which such seed-grain loan may be granted, and on which such loan is hereby declared to be a lien, which shall take precedence over any and all incumbrances."

Section 5 provides,

"That such tax shall be paid in three instalments as nearly equal as may be, and be included in the tax levy for the years 1894, 1895 and 1896."

Section 6 provides that, to distribute the money appropriated, the state auditor shall draw a warrant on the state treasurer for the amount allowed each county, and the county auditor shall thereupon draw his warrant on the county treasurer for the amount allowed each person. Section 7 provides that all moneys collected on such seed-loan tax shall be paid over to the state treasurer, and section 8 provides that, whenever such tax remains unpaid and becomes delinquent, the board of county commissioners shall order the amount thereof paid to the state treasurer out of the county treasury. Chapter 226 amends chapter 225 in several particulars, and declares the seed-grain loan a lien on the land for which the loan was made,

"And upon the crop of grain raised each year by the person receiving such loan until such amount is fully paid."

It also provides that such lien "shall take precedence over any and all incumbrances acquired subsequent to the lien of such loan."

1. There is nothing in appellant's claim that the application of Herman Peterson for the seed-grain loan, set out in the intervenor's complaint, does not state the land which he owns or that he owns any land. The third question in the application, and the answer thereto, is as follows:

"(3) Give full description of land, with the number of acres owned. 160 on Sec. 10, Town 158, range 48; 80 acres on Sec. 9; 40 acres on Sec. 17; and 80 acres on Sec. 19."

True, this does not state what part of the section each parcel of land is in, but the twelfth question is,

"(12) Give description of land upon which you intend to sow seed grain,"

And the answer to this question gives the same description and same number of acres, with the addition of the government subdivision of the section, and states that all of the land is in township 158, range 48.

These proceedings must be construed liberally in favor of the state, and it should be presumed that the same land is referred to in the third answer as in the twelfth answer in the application. The law did not permit him, because he owned land in one place, to obtain state aid to procure seed grain to sow in another place.

2. The application shows that Herman Peterson owned more than 160 acres of land, to wit 360 acres, and it does not appear, by the application or otherwise, that there was a mortgage incumbrance on any of it. Appellant contends that, as the statute prohibits every person owning more than 160 acres of land, free from mortgage incumbrance, from taking the benefits of the act, the whole proceeding is void. It does not appear that the statutory notice was given of the meeting of the board of county commissioners to act on the application for seed-grain loans. It is not alleged that certain other provisions of the law were complied with. Appellant contends that for these reasons the state gave away its

money improvidently, and without the right to reclaim it under the law. We cannot so hold.

These proceedings were not in invitum, but were voluntary on the part of Herman Peterson, and, in our opinion, he is estopped, while taking the benefit of the statute, from denying that the statute has been complied with; and all those standing in his shoes are likewise estopped.

3. There is nothing in the claim that chapters 225 and 226 are each unconstitutional because the subject of each act is not expressed in its title.

4. Neither is there anything in the claim that the method of collecting the amount loaned by levying a tax on the land is unequal taxation. It is not taxation at all. It is a statutory method of foreclosing a statutory lien for money loaned. Besides, that point does not concern appellant, as the claim here made by the intervenor is not under the statutory provisions for levying a so-called tax, but under the provision declaring the amount due a lien on the crops of grain thereafter raised on the land.

5. But there is one ground on which, in our opinion, this statute is unconstitutional. It appropriates public money for a private purpose. It is well settled that public money may be appropriated for the support of paupers, but the statute in question does not limit the appropriation to those who are paupers. On the contrary, it permits every one who has not more than 160 acres of land, free from mortgage incumbrance, to borrow from the state. A person might have 10,000 acres of land, worth \$100,000, subject to a mortgage of only \$500, and he would be entitled, under the terms of this act, to borrow from the state. He might also have one million dollars' worth of personal property, and still he could borrow from the state. Section 10 of article 9 of the constitution provides:

"The credit of the state shall never be given or loaned in aid of any individual association or corporation."

If the state cannot loan its credit, it cannot borrow the money on its own bonds, and then loan the money. It cannot do indirectly what it cannot do directly.

It was held in *Coates v. Campbell*, 37 Minn. 498, 35 N. W. 366,

that a village cannot issue bonds to aid in an enterprise partly public and partly private.

Taxation cannot be imposed for a private purpose, and, if the state can appropriate for a private purpose the money in its treasury and then replace it by taxation, it can do indirectly what it cannot do directly.

The cases of *Lowell v. City*, 111 Mass. 454, and *State v. Osawkee*, 14 Kan. 418, are much in point. The latter case holds that no one can obtain such public aid unless he is actually a pauper, however imminent and immediate the danger of his becoming such. It may be that, if this question were before us, we should not go thus far, but would hold that, in the midst of such a great public calamity, a person who is within one degree of being a pauper, and in imminent and immediate danger of becoming such, may, for the purpose of preventing him from becoming such, be given aid by the state or municipality without violating the constitution. Such was the holding in *State v. Nelson*, 1 N. D. 88, 45 N. W. 33. But that question is not before us in this case. Our statute did not confine its benefits to those who were a public charge and those in imminent and immediate danger of becoming such.

6. However, it does not follow that, because the act in question is unconstitutional, the state has no claim for the money received from it by Herman Peterson. When a party dealing with a corporation has received from it the consideration for the contract, he is estopped to assert that such contract is *ultra vires* on the part of the corporation. 27 Am. & Eng. Enc. 363. We see no reason why this principle should not be applied in favor of public or municipal corporations as well as of private corporations, and are of the opinion that it should be applied in this case.

The provisions of the statute constitute the most of the *ultra vires* contract which Herman Peterson and those standing in his shoes are estopped to deny. And those who acquired from him a lien or interest subsequent to the lien of the state, with actual notice of the rights of the state, are in no better position than he is. But, of course, third parties, who have received no notice but the constructive notice provided for by this unconstitutional statute, are not affected thereby, and the state's lien is not protected

against rights subsequently acquired by third parties in good faith, without notice, and for a valuable consideration. But whether a plaintiff, who institutes garnishment proceedings without notice of a prior unrecorded lien on the defendant's property in the hands of the garnishee, will prevail over that lien, is a question which we will not now decide.

True, the statute provides that service of the garnishee summons "shall attach and bind" the property in the hands of the garnishee. G. S. 1894, § 5309. But it is generally held that the recording of a lien or chattel mortgage is a substitute for a transfer of the possession from the debtor. Jones, Chat. Mort. (4th Ed.) §§ 236, 329. Of course, property garnished is always found in the possession of a third party, the garnishee, not in the possession of the debtor. But none of the questions here suggested have been argued, and it is not necessary to decide them in order to dispose of this appeal.

The burden is on the plaintiff to show that it acquired its lien without notice of the lien of the state. See Nickerson v. Wells-Stone Merc. Co., 71 Minn. 230, 74 N. W. 891.

7. Appellant contends that the claim for the seed-grain loan belongs to the state, and that the state, and not the county of Marshall, should intervene as claimant. The money was loaned by the state, and the county officers were at first mere agents of the state to collect the amount due it. But, by the terms of the act, the tax to repay the loan should have been levied by the county, and, if levied, has long since become delinquent. Chapter 225, § 8, provides that, if such tax shall remain unpaid and become delinquent, the amount thereof shall be paid to the state out of the county treasury. If the act was constitutional, we might have to presume that all of these things have been done.

It is presumed that public officers do their duty. But we cannot presume that the county has complied with this unconstitutional statute, and paid the state the amount of the delinquent tax, so as to be subrogated to the rights of the state, and the claimant's complaint does not allege that the county has done so. For this reason the demurrer to that complaint should have been sustained.

Order reversed.

ROBERT G. MORRISON v. WILLARD W. MORSE.

December 27, 1898.

Nos. 11,331—(194).

Promissory Note—Consideration—Mistake in Satisfying Prior Mortgage—Evidence.

C. purchased of C. G. M. six lots, and gave a purchase-money mortgage on the same lots for \$5,950, making \$979.66 thereof a proportionate share and specific mortgage lien on lot 9 of said lots. Through mesne conveyances the defendant M. became the owner of said lot 9, subject to said lien of \$979.66. Subsequently C. reconveyed all of said lots to C. G. M., except lot 9, in payment of said mortgage, except it was agreed between them that the mortgage lien of \$979.66 on lot 9 should not be included in said deed of reconveyance, but that said lot should be subject to the payment of its proportionate share. C. G. M. then executed a satisfaction of said mortgage, which, by mistake or oversight, included lot 9, which satisfaction was recorded. Thereafter C. G. M. represented to M. that the mortgage and interest on lot 9 had not been paid, and thereupon M. executed to him a note for the amount of said lien and interest, and he executed a new satisfaction, releasing lot 9 from said mortgage lien, each of the parties supposing that said lien had not been released, and it stood admitted that it had not been paid; and C. disclaimed any interest in said lot, or the lien thereon. C. G. M. sold the new note to the plaintiff, who brought this action to recover the amount thereof, and M. defended upon the ground of want of consideration. *Held*, that the evidence was conclusive that lot 9 became the primary fund for the payment of the \$979.66, and that, as C. did not pay it, plaintiff had a mortgage lien on defendant's said lot 9, and, such lien being discharged by the new satisfaction, there was sufficient consideration for the new note given by M., the defendant, and sued upon in this action.

From an order of the district court for Hennepin county, Lancaster, J., denying a motion for a new trial, defendant appealed. Affirmed.

Penney & McMillan, for appellant.

Jayne & Morrison, *Robert G. Morrison* and *Flannery & Cooke*, for respondent.

The note in suit was given in payment of a then existing debt and

therefore has a sufficient consideration. *Holm v. Sandberg*, 32 Minn. 427; *Close v. Hodges*, 44 Minn. 204; *D. M. Osborne & Co. v. Doherty*, 38 Minn. 430; 1 *Daniel*, Neg. Inst. § 186. Further, the note being given for that which in equity and good conscience the defendant ought to pay, its payment will be enforced. 9 *Am. & Eng. Enc.* 878; *Clarke v. Dutcher*, 9 *Cow.* 674; *Langevin v. City of St. Paul*, 49 Minn. 189; *Pensacola v. Braxton*, 34 *Fla.* 471; *Kerr, F. & M.* 436. Equity will consider an incumbrance as in force if the ends of justice can be thereby attained. *Lowrey v. Byers*, 80 *Ind.* 443; *Hanlon v. Doherty*, 109 *Ind.* 37. Mistake may not only be expressly established, but it will be inferred from circumstances and from the nature of the transaction. *Geib v. Reynolds*, 35 *Minn.* 331.

Where the mortgagee takes a conveyance of a part of the mortgaged premises, the mortgage is satisfied as to that part and the debt is extinguished pro tanto and no more. *Wilhelmi v. Leonard*, 13 *Iowa*, 330; *James v. Morey*, 2 *Cow.* 246; *Drury v. Holden*, 121 *Ill.* 130; 1 *Pingrey*, *Mort.* § 1061; *Mann v. Mann*, 49 *Ill. App.* 472; *Sahler v. Signer*, 44 *Barb.* 606; *Trimmer v. Vise*, 17 *So. C.* 499; *Ehrman v. Alabama*, 109 *Ala.* 478. See also *Knickerbacker v. Boutwell*, 2 *Sand. Ch.* 352; *Casey v. Buttolph*, 12 *Barb.* 637; 15 *Am. & Eng. Enc.* 330. A release, like any other contract, may be shown to lack the essential element of consideration. *Hanlon v. Doherty*, *supra*; 1 *Jones*, *Mort.* § 773.

BUCK, J.

This action was brought to recover on a promissory note for the sum of \$1,135 made by the defendant, Morse, payable to the order of Charles G. Morrison, and indorsed by him to the plaintiff herein, Robert G. Morrison. In his answer the defendant, Morse, alleges a want of consideration for the note. On the trial the court directed the jury to find a verdict in favor of the plaintiff for the sum of \$1,375.33.

The record shows that on August 5, 1886, the payee in said note owned lots 8 to 13, inclusive, in block one of Charles G. Morrison's addition to Minneapolis, and on that day the payee (Charles G. Morrison) and his wife conveyed all of these lots to one Ezra P. Chit-

tenden, who executed to Charles G. Morrison a note for the purchase money, in the sum of \$5,950, and a mortgage of the same amount upon these lots, and therein each of said lots was charged with the payment of its proportionate share of the whole amount,—such share amounting to \$979.66 on each lot, and interest thereon; and the parties agreed that each lot should be released from the lien of the mortgage on payment of said sum of \$979.66 and interest.

On March 21, 1887, Chittenden conveyed lot 9 of said lots to one Woodbury, and Woodbury conveyed the same to one Lucy H. Duncan, and on October 17, 1887, she conveyed the same lot to the defendant, Morse. Each grantor conveyed said lot subject to the mortgage lien thereon of \$979.66. On May 23, 1886, Chittenden reconveyed to Charles G. Morrison all of said lots, except said lot 9.

On February 6, 1889, Charles G. Morrison executed a certificate of satisfaction of the entire mortgage, covering all of said lots and property described in said mortgage, and in said certificate stated that said note and mortgage had been paid. Who filed the satisfaction for record, does not appear. At the time it was executed the defendant, Morse, was still the owner of said lot 9, and did not actually know of the execution of the satisfaction, or of its recording, and had not paid his proportionate share of \$979.66, which by the various conveyances was a charge and lien upon his said lot 9 for said sum, and which he never at any time paid; and he well knew that it was stipulated in the mortgage that by the payment of said proportionate amount of \$979.66 his lot 9 would be released from the lien of the mortgage. Upon no other condition does it appear that the lien of the mortgage on his said lot was to be discharged.

As Chittenden was unable to make any payments on the mortgage which he had given for the purchase money, he made arrangements with Charles G. Morrison whereby, to avoid the expense of foreclosure, the latter consented to have Chittenden redeem the property as payment of said mortgage, except upon lot 9, but the \$979.66 mortgage was not to be considered as paid by such redeeming; and said Morrison never received payment of said \$979.66 by virtue of said redeeming of the Morse lot (No. 9), although, in form,

the said satisfaction so stated. If Morse had been affected by reason of this knowledge of the contents of this satisfaction, and had acted accordingly, possibly Morrison would have been bound by the contents of the instrument which he signed; but Morse is making no such claim, and his acts were in no way affected by the contents of the satisfaction. And the mortgagee's (Morrison's) uncontradicted testimony shows that he did not in fact know, when Morse gave him the note in controversy, that the mortgage on lot 9 had been released.

Just why lot 9 was not excepted from such release of the mortgage does not very satisfactorily appear, although it is fairly inferable from the whole record that it was a mistake or oversight on the part of Morrison. But Morse makes no claim, in his testimony, that he was misled, or deceived by the satisfaction on record, or that he signed the note on the strength of any such instrument having been executed. And Morrison did not knowingly deceive or mislead Morse, as he supposed the mortgage lien of \$979.66 was still unsatisfied of record. With this existing condition of affairs on the part of each, Morrison, apparently in good faith, stated to Morse that the mortgage on lot 9 would have to be paid, unless something was done about it, and that he owned the mortgage. Morse testified about the matter as follows:

"We finally, after more or less talk about it, agreed that I would give my personal note, in the sum of \$1,135, payable on or before five years, at 7 per cent., and secured by a new mortgage on this lot nine, and in consideration of that he would release the old mortgage; and in pursuance of that I executed this note, made out a satisfaction of the mortgage of \$979.66, and a new mortgage for \$1,135 on this lot."

Now, there cannot be any reasonable doubt but that in equity the lien of the first mortgage still existed on lot 9; for \$979.66 of the mortgage had not been paid, and the release was made and filed through mistake or oversight. Chittenden did not claim that it was paid, and did not ask for a satisfaction, but, on the contrary, expressly agreed with Morrison that the redeeding of the five lots should be made to Morrison as payment of the mortgage, except that it should not operate to pay the \$979.66 due on lot 9.

Here was an express agreement that the satisfaction should not include the lien on lot 9, that it should not be deemed paid, and that it was not then paid; and certainly in equity, if not in law, it remained a lien upon said lot, as stipulated in the mortgage. Even if Chittenden had paid it to Morrison, he would have been subrogated to the rights of Morrison in said lien, and could have enforced it against the lot, if Morse did not pay it, because Morse purchased the lot subject to it, and had not paid it, which lien Morrison had never released in favor of Morse.

It is true that Morse had never entered into a personal obligation to pay this incumbrance to any one, but he purchased the lot subject to this incumbrance; and, unless it was paid, it would be subject to the foreclosure of the mortgage therein, and his title to the lot lost, unless in some way he removed the lien of the mortgage. Now, by giving the new note to Morrison, and getting him to give a new satisfaction he was released from the liability of the mortgage lien, or losing his lot by foreclosure. Morrison, by giving the new satisfaction, parted with all his right and interest in the mortgage lien on lot 9, and Morse thereby held it free from such lien.

These facts show ample consideration for the note in controversy. Morse parted with no previous consideration in discharging the mortgage lien upon his lot, and, in giving the note herein sued upon, he merely did his duty towards paying an equitable, if not a legal, obligation, which he preferred to do rather than lose the lot incumbered by the lien; and why should he complain?

Upon this note, dated May 1, 1889, he paid annual interest up to the year 1895, amounting to more than \$400, and only seeks to avoid payment, not because he or anybody else ever paid the note, but because the record merely shows a release of the entire mortgage. There is no equity in his defense, and the law does not uphold it.

Order affirmed.

MITCHELL, J.

I concur. The only question in the case is whether the evidence of a consideration for the note sued on was conclusive.

Defendant's lot became the primary fund for the payment of the

\$979.66, which by the terms of plaintiff's mortgage was made a specific lien upon it. It stands admitted that defendant never paid it. If it has ever been paid, it was by Chittenden by the reconveyance to plaintiff of the other lots. If Chittenden did not pay it, then plaintiff still had a mortgage lien on defendant's lot. If he did pay it, then, under the doctrine of equitable subrogation, he became entitled to resort to the lot for reimbursement. In other words, upon the undisputed facts, either plaintiff or Chittenden had a claim on the lot for the payment of the \$979.66.

As against a mere admission of plaintiff in the satisfaction piece that the whole mortgage had been paid, there is the positive testimony of both plaintiff and Chittenden that the reconveyance by the latter to the former was in payment and satisfaction only of that part of the mortgage indebtedness secured on the lots reconveyed. The testimony of Chittenden, who must have had a claim on the lot, if plaintiff had not, practically amounted to a formal disclaimer.

Upon this state of the evidence the court was justified in directing a verdict.

CANTY, J.

I concur with Justice MITCHELL.

JANET R. MILLER v. CITY OF MINNEAPOLIS.

December 27, 1898.

Nos. 11,344—(213).

City of Minneapolis—Waterworks—Fire—Negligence of Officers.

Held, so far as the city of Minneapolis maintains its water plant for use by its fire department in extinguishing fires, it is performing a public or governmental function, and is not liable for the negligence of its officers and servants in permitting the pipes and hydrants to become clogged and choked with sand, bark and other refuse.

Action to recover \$2,500, the value of certain household goods destroyed by fire. From an order of the district court for Hennepin county, Johnson, J., sustaining a demurrer to the complaint, plaintiff appealed. Affirmed.

Welch, Hayne & Hubachek and P. M. Babcock, for appellant.

When, in pursuance of an express power, a municipal corporation engages in business enterprises by which it becomes assimilated to private corporations, it is held strictly to the same liability as are private corporations and individuals. *McCarthy v. City*, 46 N. Y. 194; *Bailey v. Mayor*, 3 Hill, 531; *Western v. City*, 31 Pa. St. 175; *Jones v. City*, 34 Conn. 1; *Stock v. City*, 149 Mass. 410; *Hand v. Inhabitants*, 126 Mass. 324; *Aldrich v. Tripp*, 11 R. I. 141; *Grimes v. Keene*, 52 N. H. 330; *Snider v. City of St. Paul*, 51 Minn. 466; 2 Beach, Pub. Corp. § 1140; *Tiedeman, Mun. Corp.* § 327.

Frank Healy and L. A. Dunn, for respondent.

That the city cannot be made liable under the facts of this case is thoroughly well established. See *Mendel v. City*, 28 W. Va. 233; *Springfield v. Village*, 148 N. Y. 46; *Tainter v. City*, 123 Mass. 311; *Wright v. City*, 78 Ga. 241; *Robinson v. City*, 87 Ind. 334; *Brinkmeyer v. City*, 29 Ind. 187; *Grant v. City*, 69 Pa. St. 420; *Vanhorn v. City*, 63 Iowa, 447; *Becker v. Keokuk*, 79 Iowa, 419; *Bryant v. City of St. Paul*, 33 Minn. 289; *Grube v. City of St. Paul*, 34 Minn. 402; *McDade v. City*, 117 Pa. St. 414; *Wheeler v. City*, 19 Oh. St. 19; *Jewett v. City*, 38 Conn. 368; *Black v. City*, 19 So. C. 412.

CANTY, J.

The complaint alleges that, while plaintiff's goods were stored in a certain building in Minneapolis, the building took fire, and the fire department responded promptly, and connected their hose and fire engines to the street hydrants in the vicinity, and would have extinguished the fire before any damage occurred to plaintiff's goods, were it not that said hydrants, and the water pipes connecting with the same, were choked and clogged with mud, sand, stones, pieces of bark and other ingredients, and by reason thereof no water did or could come through the hydrants for nearly an hour after said connection had been made by the fire department, and the mud, sand, bark and other ingredients choked the engines, and by reason thereof the fire department were powerless and unable to get any supply of water to extinguish the fire, or prevent the spread of it, until plaintiff's goods were burned and destroyed.

It is further alleged that the city erected and maintained the

water plant, pipes, hydrants and water service, and charged a compensation to private customers for the use of the same, but it is admitted that the city furnished the same for fire service without compensation, except such as is paid by general taxation. It is further alleged that the city was negligent in permitting the pipes and hydrants to be so choked and clogged that plaintiff's goods were destroyed as aforesaid by reason of such negligence, and this action is brought to recover damages for the same.

The city demurred, on the ground that the complaint does not state a cause of action, and, in our opinion, the demurrer was properly sustained. The city charter permits and authorizes, but does not compel, the city to maintain such a water plant and service. In maintaining the same for the use of its fire department, the city is performing a public or governmental function, and is not liable for the negligence of its officers or servants in permitting the plant to be out of repair or out of condition for service. *Mendel v. City*, 28 W. Va. 233, and cases cited; *Springfield v. Village*, 148 N. Y. 46, 42 N. E. 405.

The city is not liable for the negligence of members of the fire department, acting within the scope of their duty (*Grube v. City of St. Paul*, 34 Minn. 402, 26 N. W. 228); and, for the purposes of protection from fire, the water plant and service must be regarded as a part of the fire department.

Order affirmed.

L. J. PETERSON v. W. S. HERBER and Others.

December 27, 1898.

Nos 11,363—(125).

Garnishment—Insurance Premiums—Findings Sustained by Evidence.

Held, that the evidence justified the finding of facts, and the finding of facts justified the conclusions of law.

From an order of the district court for Hennepin county, Simpson, J., denying a motion for a new trial, the claimant, George Ackerson, appealed. Affirmed.

John J. McHale, for appellant.

M. L. Fosseen, for respondent.

BUCK, J.

On December 1, 1897, L. J. Peterson brought suit in justice court against W. S. Herber, the defendant, and obtained default judgment in the sum of \$14.55 and costs. When this suit was brought, the plaintiff also instituted a garnishee proceeding in the same court against Charles E. Hedwall, as garnishee. Upon the garnishee's disclosure it appeared that a return premium of \$45 had come into his hands as the local agent of the Svea Assurance Company.

At the request of the defendant, Herber, who was an insurance broker, the Svea Assurance Company, through its agent, Hedwall, issued a policy of insurance to the Hennepin County Barrel Company on payment of the premium of \$45 by the defendant, Herber, the broker, who had received the money from his principal, the barrel company. Subsequently, this insurance company canceled the policy, which was surrendered by the barrel company through their broker, Herber, the return premium, \$30.42, being returned by the insurance company to their agent, Hedwall, to be refunded to the barrel company.

The defendant, Herber, procured for the barrel company another policy for like amount in the Providence Insurance Company, and delivered it to the barrel company, with a statement of account, in which he charged the company with the premium on the second policy, and his brokerage fees, and credited them with the amount of the return premium on the first policy. The barrel company paid them the balance, and he receipted to it in full.

The garnishee, Hedwall, and the defendant, Herber, kept, for their own convenience, mutual accounts. Subsequently these accounts were stated and settled, at which time it was found that the garnishee was indebted to defendant, Herber, in the sum of \$30.42, including the return premium on the canceled policy of the Svea Assurance Company, which Hedwall then promised to pay to Herber, and he agreed to accept the same in full payment of their account.

It does not appear whether the defendant, Herber, has ever paid over to the Providence Insurance Company the premium on its policy. Neither does it appear that it is making any claim therefor against the barrel company, and it has never paid this premium unless by the turn with the broker, Herber.

When Hedwall was garnished, the claimant, Ackerson, on motion of the garnishee, was cited to appear and maintain his right to the return premium. He appeared and filed a complaint, and upon trial the foregoing facts were disclosed, and judgment rendered against Hedwall, for the said sum of \$30.42, and that Ackerson had no interest in the return premium.

On appeal to the district court substantially the same proceedings were had, and the same facts appeared, and the judgment of the justice was affirmed, and this is an appeal from an order denying claimant's motion for a new trial.

Counsel for Ackerson contends that the debt disclosed by Hedwall, garnishee, was not owing by him to Herber, but was owing the Svea Assurance Company; but the disclosure clearly showed an indebtedness due from Hedwall to Herber, and a promise on his part to pay it to Herber, and that there was no contractual relation between Hedwall and Ackerson's assignor, the Svea Assurance Company, by which any liability existed on the part of Hedwall to pay it to Ackerson in any capacity. His liability to Herber was direct, both upon the account stated, and his promise to pay it.

Order affirmed.

GEORGE ACKERSON v. SVEA ASSURANCE COMPANY.

December 27, 1898.

Nos. 11,364—(126).

Assignment—Insurance Premium—Evidence.

Held, that the evidence justified the findings of fact, and the findings of fact justified the order for judgment.

From an order of the district court for Hennepin county, Simp-

son, J., denying a motion for a new trial after dismissing the action, plaintiff appealed. Affirmed.

John J. McHale, for appellant.

A. L. Brice, for respondent.

BUCK, J.

The plaintiff brought this action in justice court against defendant to recover the sum of \$45 and interest, and upon the trial judgment was rendered in favor of the defendant, whereupon an appeal was taken to the district court, and upon trial there the defendant obtained an order for judgment dismissing the action, and from an order denying plaintiff's motion for a new trial this appeal was taken.

The fund in controversy was litigated in a previous action in the same court wherein L. J. Peterson was plaintiff and W. S. Herber was defendant, Charles E. Hedwall garnishee, and the plaintiff herein, George Ackerson, was claimant. However, a brief statement of the facts seems advisable for a full understanding of the case: Hedwall was the local agent of the defendant, Svea Assurance Company, and Herber an insurance broker. At the request of Herber, the defendant, through its agent, Hedwall, issued a policy of insurance to the Hennepin County Barrel Company on payment of the premium of \$45 by Herber, the broker, who had received the money from his principal, the barrel company. Subsequently defendant canceled its policy, which was surrendered by the barrel company through Herber, the return premium—\$30.42—being returned by the insurance company to the agent, Hedwall, to be returned to the barrel company. Herber procured for the barrel company another policy for a like amount in the Providence Insurance Company, and delivered it to the barrel company with a statement of account, in which he charged them with the premium on the second policy, and his brokerage fees, and credited them with the amount of the return premium on the first policy. The barrel company paid him the balance, and he receipted to it in full.

The garnishee, Hedwall, and the broker, Herber, kept, for their own convenience, mutual accounts. Subsequently their accounts were stated and settled, at which time it was found that the gar-

nishee, Hedwall, was indebted to Herber, the defendant, in the former action, in the sum of \$30.42, including the return premium on the canceled policy of the Svea Assurance Company, defendant herein.

It does not appear whether Herber has ever paid to the Providence Insurance Company the premium on its policy. Neither does it appear that it is making any claim therefor against the barrel company, and the latter has never paid the premium, unless by the terms with Herber, the broker.

Peterson, the plaintiff in the other action, sued Herber, the broker, and garnished the \$30.42 in Hedwall's hands as a debt presumably due from the latter to the former, as above stated. Ackerson, the plaintiff herein, as claimant of the same fund in the other action, and as an intervening party thereto, now sues, as assignee of the barrel company, the Svea Assurance Company, for the return premium on the canceled policy.

The test as to whether the defendant is liable in this case depends substantially upon the same evidence as in the other action, and seems to be whether the right to the fund in controversy, viz., the return premium, or, rather, \$30.42 thereof, had passed from the barrel company to Hedwall, the garnishee, before the attempted assignment thereof by said company to the plaintiff, Ackerson. We think it had so passed, and that it had no further interest in said return premium which it could assign to the plaintiff, Ackerson, and that defendant is not liable therefor.

There remains, however, to be considered the question of the admission in evidence, against plaintiff's objection, of the clerk's records in the case of Peterson against Herber, defendant, Hedwall, garnishee, and the plaintiff herein, Ackerson, as claimant for the same fund. The trial court held the evidence proper, and ordered judgment of dismissal of the action upon the ground that such proceedings in the former action constituted a bar to the prosecution of this action. This, doubtless, was error, but it was error without prejudice, as upon the facts found the defendant was entitled to order for judgment of dismissal, irrespective of the rec-

ord proceedings in the other action. It is familiar doctrine that a wrong reason for a right ruling is not reversible error.

Order affirmed.

CLINTON MARKELL v. ROBERT C. RAY and Others.

December 27, 1898.

Nos. 11,390—(181).

Amendment of Pleading—Error without Prejudice.

If it was error to amend the complaint by an *ex parte* order, *held*, it became error without prejudice, because the same amendment was subsequently allowed on a motion made on due notice.

Estate of Deceased Stockholder—G. S. 1894, § 5927—Insolvency of Corporation—Statute of Limitations.

It cannot be held that by G. S. 1894, § 5927, an action to charge the distributees of the estate of a deceased stockholder with his stockholder's liability, to the extent of the estate received by them, is barred in one year after the corporation goes into insolvency.

Additional Party Defendant—Minor—G. S. 1894, § 5178.

Held, a minor, as well as a person *sui juris*, may be brought into an action, as an additional party defendant, by the service on him of an order reciting the summons, as provided by G. S. 1894, § 5178.

Joint Stockholders—Tenants in Common—Liability.

It appeared by the books of the corporation that a certain number of shares of its stock were held by two certain persons. It did not appear by the books or otherwise that they were partners, or held the stock as such. *Held*, they were tenants in common, each of an undivided one-half interest in the stock, and neither can be held for more than one-half of the stockholder's superadded liability.

Liability of Executor—G. S. 1894, § 3419—Transfer of Stock.

The executor, pursuant to the provisions of the will, procured stock, which stood in his own name on the books of the corporation, to be transferred to him as executor. Thereafter the corporation went into insolvency. *Held*, the estate thereby became primarily liable, and he became secondarily liable, on such stock. *Held*, under G. S. 1894, § 3419, whether the stock stood in the name of the testator or not, the executor does not make himself personally liable thereon by having the same

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transferred to himself as executor, when the will authorizes such transfer.

Insolvency of Creditor—Liability of Creditor as Stockholder—Set-Off in Equity.

Five years before this action was commenced, or the corporation went into insolvency, one of its stockholders, who was also one of its creditors, made an assignment under the insolvency law; and his stock, and the debt due to him from the corporation, passed to his assignee. Such debt has not been paid, and his estate has not been settled. *Held*, the liability on his stock is not, at law, a claim against the assets in the hands of his assignee, but equity will set off one claim against the other. However, under the circumstances, the stockholder's liability should be set off, not merely against the dividend coming to the assignee as creditor, but against the whole claim held by him.

Action by the assignee of Henry H. Bell, insolvent, in behalf of himself and all other creditors of the Masonic Temple Association of Duluth, insolvent, against the association and its shareholders to enforce the statutory liability of stockholders. Defendants Robert C. Ray, Caroline E. Ray and Marion Ray, were the devisees of James D. Ray, deceased, who at the time of his death was an owner and holder of certain shares of the stock of said association. Robert C. Ray was also sued as executor of said James D. Ray, deceased.

From a judgment against the defendants Ray and from an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial, defendants Ray appealed. Modified.

Billson, Congdon & Dickinson, for appellants.

The court below erred in allowing an amendment of the complaint by an ex parte order, without notice or hearing to defendants Ray who had already appeared and joined issue. *Mackubin v. Smith*, 5 Minn. 296 (367); *Stein v. Roeller*, 66 Minn. 283; *Davidson v. Lamprey*, 16 Minn. 402 (445); *Berthold v. Fox*, 21 Minn. 51; *Gillette-Herzog Mnf. Co. v. Ashton*, 55 Minn. 75; *Hill v. Hoover*, 5 Wis. 386; *Weed v. Weed*, 25 Conn. 337; *Rice v. Ehele*, 55 N. Y. 518; *Hughes v. McCoy*, 11 Colo. 591; *Doan v. Holly*, 27 Mo. 256. The fact that the period of limitation was about to expire afforded no justification for the amendment without notice, but was rather a

reason why it should not have been allowed. *Stevens v. Brooks*, 23 Wis. 196. A court has no power to extend, or modify or prevent, the operation of the statute of limitations, even by order which would be proper, were it not for such statute. *Humphrey v. Carpenter*, 39 Minn. 115. The allegations permitted to be incorporated into the complaint were not allowable as an amendment, because they set forth a new cause of action wholly different from, and in addition to, that originally pleaded. The cause of action in the original complaint was predicated on the fact merely of the defendants being owners of stock of the corporation, and rested upon the constitutional provision subjecting stockholders to liability; while the cause of action pleaded in the amendment was predicated upon the fact of defendants having become the owners of the stock by devise, and rested upon G. S. 1894, §§ 5921, 5924. It was error to allow an amendment of the complaint bringing in Marion Ray, a minor, as an additional defendant, by an order reciting the summons, and requiring her to answer the complaint under the provisions of G. S. 1894, § 5178. See *New York v. Remington*, 89 N. Y. 22; *Helms v. Chadbourne*, 45 Wis. 60; *Carver v. Carver*, 64 Ind. 194; *Roy v. Rowe*, 90 Ind. 54.

The constitutional provision subjecting stockholders to liability is to be strictly construed. 1 *Cook, Stockh.* (3d Ed.) § 214; *Sutherland*, St. §§ 366, 371, 400; *Wing v. Slater*, 19 R. I. 597. Neither R. C. Ray, Caroline E. nor Marion Ray, became owners of stock by force of the will of the testator, or of the decree of distribution, and the imposing of direct liability upon them as stockholders was not justified. The acceptance of the stock was refused. A legatee as well as any other donee may forbear or refuse to accept. 2 *Schouler*, Pers. Prop. §§ 60-85; 1 *Cook, Stockh.* § 252; *Basting v. Northern Trust Co.*, 61 Minn. 307; *Cannon River M. Assn. v. Rogers*, 42 Minn. 123; *Goss v. Singleton*, 2 Head (Tenn.) 67.

G. S. 1894, § 5927, barred the enforcement of the liability of appellants as legatees and devisees. This statute is to be liberally construed. *City of St. Paul v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 387; *County of Redwood v. Winona & St. P. L. Co.*, 40 Minn. 512. See also *In re Martin's Estate*, 56 Minn. 420; *Hill v. Nichols*, 47 Minn. 382; *State v. Norton*, 59 Minn. 424; *Cooley*, Const. Lim.

(5th Ed.) 80; Sutherland, St. §§ 240, 241; *In re Ackerman*, 33 Minn. 54; *Thornton v. Turner*, 11 Minn. 237 (336); *Hempsted v. Cargill*, 46 Minn. 118. The right of action accrued at the insolvency of the corporation or when it made its assignment October 31, 1895. See *Minneapolis Paper Co. v. Swinburne P. Co.*, 66 Minn. 378; *Sturtevant-Larrabee Co. v. Mast, Buford & B. Co.*, 66 Minn. 437; 1 Cook, Stockh. § 219. If there were any doubt as to the fact of the statute of limitations having barred this claim, that doubt is completely put at rest by the decision in *Burns v. Phinney*, 53 Minn. 431. See also *Sandberg v. Palm*, 53 Minn. 352. The statute runs on the claims of intervenors until presented by an actual intervention. See *Mason v. City*, 163 Ill. 351; *Dunphy v. Riddle*, 86 Ill. 22. Where the complaint is amended making new parties, the statute runs as to them until they are thus brought in and charged with liability by proper pleading. *Miller v. M'Intyre*, 6 Pet. 61; *Levy v. Wilcox*, 96 Wis. 127. So if an amendment introduces a new cause of action, the statute runs against it until such amendment is made. 1 Enc. Pl. & Pr. 622; *Holmes v. Trout*, 7 Pet. 171; *Sicard v. Davis*, 6 Pet. 124; 2 Wood, Lim. § 294; *Bruns v. Schreiber*, 48 Minn. 366; *Estey v. Fisher* (Tex. Civ. App.) 44 S. W. 555.

It is immaterial whether the intervenors knew when their right of action accrued. *P. P. Mast & Co. v. Easton*, 33 Minn. 161; *Cock v. Van Etten*, 12 Minn. 431 (522). This is a suit in equity and laches on the part of a suitor bars his right to relief. *O'Mulcahey v. Gragg*, 45 Minn. 112. The plaintiff as the assignee of Bell is chargeable as a stockholder to the extent of 420 shares. *Harper v. Carroll*, 66 Minn. 487.

Abbott & Crosby and Walter Ayers, for respondent.

There is a class of claims which cannot be proven against the estate, of which the claim in suit is one. See *In re Martin's Estate*, 56 Minn. 420; *Hospes v. N. W. Mnfg. & Car Co.*, 48 Minn. 174; *Hantzch v. Massolt*, 61 Minn. 361.

In the case of contingent claims, such as the one at bar, it is optional with the holder whether such claim should be presented for allowance in the probate court at all or whether suit should be brought against the executors on the same. The creditors also

have the right in case of contingent claims to proceed against the heirs and devisees after the estate has been closed. *Bryant v. Livermore*, 20 Minn. 271 (313); *McKeen v. Waldron*, 25 Minn. 466. That the present claim could neither be proven, allowed, nor in any wise established by the probate court, has been frequently decided. *Hospes v. N. W. Mnfg. & Car. Co.*, supra; *In re Martin's Estate*, supra; *Hantzsch v. Massolt*, supra.

The assignee of an insolvent debtor, a portion of whose assets consists of shares in a manufacturing corporation, is not liable either at law or for contribution in equity to a creditor of the corporation. *Gray v. Coffin*, 9 Cush. 192.

CANTY, J.

This is an action under G. S. 1894, c. 76, brought on behalf of the plaintiff and all other creditors of the Masonic Temple Association of Duluth, an insolvent corporation, to enforce the double or super-added liability of its stockholders.

1. The action was commenced October 31, 1895. Only a few of the alleged stockholders were then made parties to the action, and among those were Robert C. Ray and Caroline E. Ray. October 23, 1896, the complaint was, on the application of plaintiff, amended by an ex parte order of the court so as to set up a new cause of action against Robert C. Ray and Caroline E. Ray. They moved to set aside the order allowing the amended complaint, and their motion was denied. This they assign as error.

Whether or not the court erred in amending the complaint by this ex parte order, and in denying the motion to set the amendment aside, and whether or not these acts of the court were error without prejudice, it is not necessary to decide, for the reason that on June 26, 1897, the complaint was again amended, on motion made on notice, and, as so amended, contained the amendment allowed ex parte as aforesaid, superseded it, and cured the alleged error. As we shall now proceed to show, the statute of limitations had not, on June 26, 1897, run against said new cause of action.

2. In the original complaint Robert C. Ray and Caroline E. Ray were charged only as stockholders. The amended complaint alleged: That they and Marion Ray are the devisees of James D.

Ray, who at the time of his death, on April 27, 1894, was the owner and holder of 1,400 shares of the capital stock of said temple association, of the face value of \$25 each. That the debt due from the temple association to plaintiff was incurred prior to that time. That James D. Ray left at his death real and personal property of the value of more than \$500,000, which by his last will he devised as follows: One-third to his widow, said Caroline E. Ray; one-half to his son, said Robert C. Ray; and the remaining one-sixth to his daughter, Marion Ray. That the will was duly probated, the estate administered, and on May 1, 1895, all the estate remaining was distributed to said devisees in said proportions,—the value of the estate so distributed being \$350,000,—and the executor was then discharged.

On these facts the amended complaint sought to charge the three devisees, under G. S. 1894, §§ 5918–5929, for the stockholder's liability of said James D. Ray. The temple association made a general assignment for the benefit of its creditors, under the insolvency law, on October 31, 1895,—the day that this action was commenced.

Appellant contends that under G. S. 1894, § 5927, the statute of limitations would have run against this claim in one year from that date, were it not for the fact that the complaint was amended *ex parte*, within the year, so as to set up the cause of action against the devisees as such, and that, therefore, appellant is prejudiced by this amendment. Section 5927 provides:

“No action shall be maintained [against heirs or devisees on such a claim] unless commenced within one year from the time the claim is allowed or established.”

We cannot hold that, as appellants contend, the commencement of this action on October 31, 1895, is equivalent or analogous to the allowing or establishing of this claim against these devisees, within the meaning of this section, so as to start the statute of limitations running. In what court or in what manner this section contemplates that the claim shall be “allowed or established,” we need not consider, but we are strongly of the opinion that appellants' contention cannot be sustained.

3. At the time said amended complaint was allowed, said Marion

Ray, a minor, was brought in as an additional party defendant, by an order reciting the summons, and requiring her to answer the complaint, as provided in G. S. 1894, § 5178. There is nothing in the claim that a minor cannot be made a defendant in this manner, and can only be made a defendant in such a case by amending the summons, and serving the same as amended. We see no reason why section 5178 does not apply to minors as well as to persons sui juris.

4. On October 31, 1895, the day of the commencement of this action, and the day the corporation made the assignment and ceased to be a going concern, 774 shares of its capital stock were registered on its books as being held and owned by "James D. Ray and Robert C. Ray." The trial court held the latter liable for the face value of all of this stock, and held the devisees of the former liable for the same amount. It did not appear that James D. and Robert C. were partners, or that they held the stock as partners, and nothing of the kind appeared by the books of the corporation. Under these circumstances, they appeared to be tenants in common, each appearing to be a holder of an undivided half interest in the stock; and we are of the opinion that Robert C. should not be held for more than one-half of the face value of the stock, and the devisees for the other one-half.

5. On October 24, 1889, James D. Ray became the registered holder of 100 shares of said stock, and Robert C. Ray of 40 shares. A part of said 774 shares was issued by the corporation to James D. and Robert C. on the same day, and the other part was transferred to them by a prior holder on June 17, 1890. These parties appeared on the books of the company to be the respective owners of this stock until June 20, 1894. James D., during all of said time up to the time of his death, was in fact the owner of all this stock, but had permitted some of it to be entered on the books as the stock of Robert C. James D. died on April 27, 1894. Robert C. was appointed his executor under his will. On said June 20, 1894, Robert C., with the consent of Caroline E. and Marion, pursuant to an agreement with them, and pursuant to the provisions of the will, caused all of said 914 shares of stock to be transferred on the books of said corporation to himself, as executor of said estate.

Thereafter, on May 1, 1895, the estate was settled, and the decree of distribution was entered, assigning all of the remaining property of said estate, including said 914 shares of stock, to the three devisees, and discharging the executor. On the same day the three devisees filed in the probate court a refusal to receive the stock, or any part of it. On these facts the court held Robert C. primarily liable for the 774 shares as aforesaid, and also held him liable for said 40 shares so standing in his name at the time of the death of James D.

Counsel contend that Robert C. was only secondarily liable for this stock, and that the estate of James D. is primarily liable, for the reason that all of this stock was transferred to the executor, and stood in his name as executor on the books when the corporation ceased to be a going concern. We agree with appellants that Robert C. is not primarily liable as stockholder on any of this stock, and is only secondarily liable as stockholder on such portion of this stock as stood in his name at the time of the death of James D.

It may be a question whether, on common-law principles, an executor who procures stock to be transferred to himself as executor would not thereby make himself personally liable, especially if before the transfer the stock stood in the name of some one other than the testator. See *In re Leeds Banking Co.*, 1 Ch. App. 231; *Spence's Case*, 17 Beav. 203; *Jackson v. Turquand*, L. R. 4 H. L. 305; *Schouler, Exrs.* § 380. But G. S. 1894, § 3419, provides:

"Persons holding stock in a corporation as executors, administrators, guardians or trustees shall not be personally subject to any liabilities as stockholders; but the estates and funds in their hands shall be liable in like manner and to the same extent as the testator, intestate, ward or person interested in the trust fund would be, if they were respectively living and competent to act, and held the stock in their own names."

We are of the opinion that where the executor had authority, under the will, to take stock in his name as executor, this section exempts him from personal liability. It therefore follows that Robert C. was personally liable as stockholder only to this extent: He was secondarily liable on the 40 shares, and on his one-half interest in the 774 shares, and the court erred in holding otherwise.

The estate alone was primarily liable on the whole 914 shares, and the three distributees must, to the extent of the assets received by them, answer for this primary liability. If they fail to do so, then Robert C. must respond to such secondary liability.

6. One Bell made an assignment, under the insolvency law of this state, to plaintiff, November 25, 1890,—nearly five years before the commencement of this action. A part of the assets so assigned by Bell was a promissory note held by him against the temple association for the sum of \$16,000. Bell at the same time held stock of the association amounting to \$10,500, which was also assigned to the plaintiff as a part of such assets. Bell was not made a party to this action, and the court finds that he is a nonresident, so that service could not be had upon him. The court ordered judgment in favor of plaintiff, as assignee of Bell, and against the other stockholders, for the amount of said note, without offsetting against the same the liability on Bell's stock. This is assigned as error.

The liability on Bell's stock was contingent. The contingency did not happen and the liability become absolute, until after Bell made the assignment for the benefit of his creditors. This contingent claim is not provable against the insolvent estate of Bell, even though it has become absolute when the attempt is made to prove it. See 3 Am. & Eng. Enc. (2d Ed.) 139; *Wilder v. Peabody*, 37 Minn. 248, 33 N. W. 852, and cases cited. But it does not follow from this that equity will not set off one of these claims against the other.

Insolvency has long been recognized as a distinct ground on which a court of equity will compel a set-off in many cases where there is no remedy at law, or where the party seeking set-off could not maintain an independent action against the party against whom set-off is sought. See *Waterman, Set-Off*, §§ 431-441. See also *Cosgrove v. McKasy*, 65 Minn. 426, 68 N. W. 76; *Richardson v. Merritt*, 74 Minn. 354, 77 N. W. 234, and cases therein cited. No general rule can be laid down, by which to determine when this equitable right of set-off exists, that will cover all cases. We are of the opinion that it exists in the present case.

Again, if this stockholder's liability of Bell was, at law, a claim

against the assets in the hands of his assignee, then the latter could only recoup against such liability the dividends which would come to him as a creditor in the action, to wit, the dividends to be paid by the receiver herein on said \$16,000 note. *Harper v. Carroll*, 66 Minn. 487, 69 N. W. 610, 1069.

But, as this stockholder's liability is a claim against the assets in the hands of the assignee only by reason of the doctrine of equitable set-off, the set-off herein must be governed wholly by the rules which a court of equity would apply in the particular case; and, as Bell and the temple association are both insolvent, there is no reason why a court of equity should favor or prefer the creditors of the one to the injury of the creditors of the other. The doctrine that equity is equality should be applied when no other rule intervenes to prevent the application of that doctrine. Therefore the set-off should be of the stockholder's liability, not against the dividends coming to the creditor, but against the whole claim held by him. The court should set off claim against claim, dollar for dollar. Of course, the claim on the stockholder's liability may not be \$10,500, the face of the stock. Such claim will be the sum of the amounts or assessments for which the court would order execution to issue, as laid down in *Harper v. Carroll*, supra.

This disposes of all the questions raised having any merit, and the case is remanded to the court below, with directions to modify the judgment in conformity with this opinion.

H. H. BABCOCK COMPANY v. W. H. WILLIAMS.

December 27, 1898.

Nos. 11,424—(195).

Unrecorded Contract Construed as Conditional Sale—Invalid as to Creditors of Vendees.

While the written contract in question purports to be a consignment of goods to defendant's assignors for sale as the agents of plaintiff, yet it appears on its face that its real purpose is to cover up a conditional sale; that it was made in such form in order that plaintiff might give said assignors a false credit, by keeping the contract off record, and still be

protected. As to the assignors' creditors, it must be regarded as a conditional sale; and, as it was never filed of record, the condition is void as to them.

Action in replevin in the district court for Ramsey county against the assignee of Crisham & Winch to recover possession of four vehicles or, in lieu thereof, the sum of \$905. The cause was tried before O. B. Lewis, J., and a jury. A verdict was directed in favor of plaintiff for two of the vehicles, and for a return to defendant of the other two. The verdict was set aside, and judgment was entered in favor of the plaintiff as the owner and entitled to the possession of all the vehicles. Defendant appealed. Reversed.

Bishop H. Schriber, for appellant.

J. F. Hilscher, for respondent.

The assignee cannot assert a greater claim or title to the goods than that held by the insolvents. *Head v. Miller*, 45 Minn. 446. A conditional sale is a sale in which the transfer of title to the thing sold to the purchaser is made to depend upon the performance of some condition. 6 Am. & Eng. Enc. 437; Newmark, Sales, § 19. Where one party was to take goods from another, sell them and return monthly the amount of sales at the price charged by the latter, who was to furnish the former with all goods in his line, as in this case, the transaction imports a consignment of goods for sale and not a sale of them. *Walker v. Butterick*, 105 Mass. 237; *Williams v. Davis*, 47 Iowa, 363; *Berry v. Allen*, 59 Ill. App. 149; *Blood v. Palmer*, 11 Me. 414; *First v. Schween*, 127 Ill. 573; *Middleton v. Stone*, 111 Pa. St. 589; *Eldridge v. Benson*, 7 Cush. 483. See also *National v. Sims*, 44 Neb. 148; *Lenz v. Harrison*, 148 Ill. 598. Such a consignment contract is not within the provisions of G. S. 1894, § 4148, which requires certain contracts to be filed. See *Cortland Wagon Co. v. Sharvy*, 52 Minn. 216; *Dewes v. Merritt*, 82 Mich. 198. The mere fact that the bailee agrees to pay a certain sum if the goods are not returned, does not itself change the transaction into a sale. *Brown v. Hitchcock*, 28 Vt. 452; *Westcott v. Thompson*, 18 N. Y. 363. See also *National v. Goodyear*, 90 Ga. 711; *Dean v. Lombard*, 61 Ill. App. 94; *Dewes v. Merritt*, supra.

CANTY, J.

The plaintiff delivered a number of carriages and buggies to Crisham & Winch under the contract hereinafter mentioned. They sold several of the articles so delivered, and thereafter made an assignment for the benefit of their creditors, under the insolvency law of this state. At the time of making the assignment they had in their custody several of the carriages and buggies remaining unsold, which they turned over to their assignee. This is an action in replevin for the possession of the same, brought against the assignee.

The theory of the plaintiff is that the goods were merely delivered to Crisham & Winch to sell the same as the agents of plaintiff. The theory of defendant is that the goods were sold to Crisham & Winch under a contract of conditional sale, and that as the contract was not filed as provided by G. S. 1894, §§ 4148-4150, the condition is void as against their creditors.

At the close of the evidence each party moved the court to order a verdict in his favor, and thereupon the court ordered a verdict for plaintiff for all of the vehicles in question, except two, and ordered a verdict for defendant for these two, as to which it was claimed that the original contract had been modified.

Thereafter, in a motion for a new trial, plaintiff moved, under Laws 1895, c. 320, for judgment notwithstanding the verdict, which was granted, and defendant appeals.

The original contract consists of two parts. Crisham & Winch signed an order, directed to plaintiff, which, so far as here material, reads as follows:

"Please ship to us, via R. R. on or before soon as possible, or as soon thereafter as practicable, the following goods, hereinafter described, which we hereby agree to receive and pay for at prices named below; also, to pay all freight or express charges on same, and settle for according to terms given.

"Terms, as per contract on back of this order, — per cent. for cash within — days from date of shipment.

"Failing to make settlement promptly according to above terms, the whole amount for goods shipped by you to become due at once, and payable in cash upon demand, without discount.

"All repairs or parts of vehicles, the terms upon same are 'net cash.' [Then follows description of property, and price to Crisham & Winch of each article.]

"When orders for special jobs are given, such orders cannot be canceled after the job has commenced. * * * No understanding or agreement with salesmen will be recognized, unless stated in this order. This order will be filled as near date stated as possible, and will be understood to hold good until goods are shipped, and not subject to countermand. Our responsibility ceases when we take the bill of lading as per your instructions. Your recourse for losses, damages and delays in delivery is upon the carrier. We do not guaranty rates of freight, unless so specified in order, but will always get the cheapest we can on day of shipment. All orders taken subject to the approval of H. H. Babcock Company, and all claims for damages must be made within five days after receipt of goods. Title to the goods shipped on this order is to remain in H. H. Babcock Company until paid for in money, and should anything occur to affect my commercial standing, or should I become insolvent, any amount still unpaid, either in account or in note or notes, shall immediately become due, and it is agreed and understood that H. H. Babcock Company shall have the right to take possession of the goods. * * * After acceptance of order, H. H. Babcock Company agree to ship all goods they may be able to supply, but are not to be held liable for damages for orders not filled."

On the reverse side of the paper on which the above is found, Crisham & Winch signed the other part of the contract, which, so far as here material, reads as follows:

"Referring to the order given you for goods as listed on the other side of this agreement, we would say that we propose to handle your work exclusively for what vehicles we may require of yours, or similar grade, during the year 1897. We will receive, pay freight, and carefully store all goods that you send us upon our order, and be responsible for any and all damages that may occur to them. Said work so furnished is to be held as a consignment. We will remit to you cash on the first of each mo. for all goods sold previous mo., less 3 per cent., or 4 mos. note; holding such cash, less our commission, in a fiduciary capacity until remitted. We also send you a written statement at the end of each month of all goods remaining unsold.

"All goods on hand December 1st, 1897, that are unsold or unsettled for, we (Crisham & Winch) will purchase and pay you (H. H. Babcock Co.) for in cash at that date, less 3 per cent., or 5 mos. note (i. e. December 1st, or any time thereafter you may designate), at the invoice price, if you request us to do so; it being understood that you (H. H. Babcock Co.) have the entire option of requiring us to purchase them at that date, or later, either in whole or in part, as you may elect. The intent and meaning of this provision is that we leave with you a proposition to purchase the goods of you (H. H.

Babcock Co.) for cash, less 3 per cent., or 5 mos. note, December 1st, 1897, or at any date following you (H. H. Babcock Co.) may elect, at the price stated, which you can accept or reject as you may choose. In case there are any goods not so purchased and paid for on or after December 1st, 1897, we will, if you say so, at any date after December 1st you may name, carefully crate them and place aboard cars, and ship them where you may direct, all without any refunds to us or charge to you whatsoever.

"Our compensation for the foregoing shall be the difference between your prices to us and what we receive in excess for the goods. In case of financial distress on our part, we agree to deliver the goods to you, as hereinbefore provided for (paragraph 2nd), at any other date than that above named as you may designate. If we delay longer than 30 days in paying for all work sold as above agreed, or fail to make report monthly, as provided for above, then this agency is to cease, and any and all goods remaining unsold are to be subject to the order of the H. H. Babcock Co., if they choose, free of any and all refunds to us and charges to them whatsoever. Any work damaged by neglect or usage to be paid for the same as if sold.

"We also agree to insure the goods at our own expense, at full value as represented by invoices, in good, solvent insurance companies, as soon as received by us; said insurance to be made payable to the H. H. Babcock Co. as their interest may appear; policy or policies to be forwarded to said H. H. Babcock Co., at Watertown, N. Y."

It is immaterial what the parties pretended to call this contract. In determining its nature we must look to its substance, and not its form. If it is sufficiently plain that the parties have used words to conceal their thoughts and intentions, we have a right to look beyond such words; and, if their real intent appears on the face of the contract, it will control. In ascertaining this intent, we must look to all of the different provisions of the contract, and see whether there are sufficient earmarks in it to show that the parties really intended the transaction as a conditional sale, but that in order that plaintiff might give Crisham & Winch a false credit by keeping the contract off record, and still be protected, the parties inserted certain provisions by which they pretended to make a contract by which the goods were to be consigned to Crisham & Winch to sell as plaintiff's agents.

It is our opinion that, at least as between plaintiff and the creditors of Crisham & Winch, the contract is one of conditional sale.

It provides that the title to the property shall remain in plaintiff until the goods are paid for in money, and that, if Crisham & Winch shall become insolvent, any amount still unpaid, either in note or notes, shall immediately become due, and plaintiff may retake the goods. It further provides that, if Crisham & Winch fail to make settlement promptly, the whole amount for goods shipped shall become due at once, and be payable in cash upon demand. It also provides that Crisham & Winch shall remit each month for all goods sold the previous month "less 3 per cent., or 4 mos. note; holding such cash, less our commission, in a fiduciary capacity."

For what purpose were they to give their note, if they held the cash in a fiduciary capacity? If they were to hold the cash for goods sold as mere bailees, and could not use it for their own purposes, why should they hold it at all for the four months for which they were to give the note? The contract nowhere states the price, or the minimum price, for which they were to sell the goods. It merely states the price to them. They were, at the election of plaintiff, to purchase all goods remaining unsold December 1, 1897, and pay for them in cash or by five months' note, or at such later date as plaintiff might elect.

There are many other minor circumstances which tend to show that it is a contract of conditional sale,—at least, as between plaintiff and the creditors of Crisham & Winch. Whatever the form of the agreement in such a case, if the purpose is to cover up a sale or a conditional sale, and preserve in the vendor a lien or right to retake the property, the right so preserved is void as against the creditors of the purchaser, unless the contract is placed of record. See *Thompson v. Paret*, 94 Pa. St. 275; *Peek v. Heim*, 127 Pa. St. 500, 17 Atl. 984; *Heryford v. Davis*, 102 U. S. 235.

It is not necessary to consider the modification of the original contract, under which it is claimed that defendant is entitled at least to the two vehicles for which the judge ordered a verdict for defendant, as this modification is, if anything, more favorable to the defendant than the original contract. This disposes of the case.

The judgment appealed from is reversed.

GEORGE D. DUNN v. GEORGIA A. DEWEY and Others.

December 27, 1898.

Nos. 11,458—(165).

Redemption—Notice of Intention by Unauthorized Agent—Party to Action.

Held, a person who, without authority, assumed to act as the agent of the second lien creditor in filing a notice of intention to redeem from the foreclosure of the first lien, is not a proper party to an action brought by the third lien creditor to compel a redemption under his lien without paying the amount of the second lien.

Same—Unauthorized Redemption in Name of Another—G. S. 1894, § 4280.

But *held*, another person who, after said notice of intention to redeem was filed, purchased the second lien, procured an assignment of it in the name of the holder of the first lien, and under it redeemed in his name from the first lien, all without his authority, is a proper party defendant to such action. The doctrine of resulting trusts is not, as to personal property, abolished by G. S. 1894, § 4280.

Complaint Bad upon Demurrer.

The plaintiff did not allege in his complaint in such action that, in his offer or attempt to redeem, he produced to the sheriff a certified copy of his mortgage, or an affidavit showing the amount actually due thereon. *Held*, the complaint does not state a cause of action.

Same—Tender.

Held, it sufficiently appears by the complaint that plaintiff has kept his tender good.

Laws 1895, c. 326.

Held, Laws 1895, c. 326, does not impair vested rights, and is constitutional, even as applied to a redemption from a judgment entered and docketed before the passage of that act.

Action in the district court for Hennepin county against Georgia A. Dewey and Andrew A. Hathaway, judgment creditors of one W. B. Clark, and the other defendants named below. The facts are stated in the opinion. Defendants Robert Webb, Fred W. Reed and Alonzo Phillips interposed separate demurrers to the com-

plaint. From orders of the district court for Hennepin county, McGee, J., sustaining these demurrers, plaintiff appealed. Affirmed.

Francis B. Hart, for appellant.

Those actively engaged in the commission of a fraud should be joined in the action therefor. 9 Enc. Pl. & Pr. 682; *Brady v. McCosker*, 1 N. Y. 214. Laws 1895, c. 326, violates no constitutional provision. See *Edwards v. Kearzey*, 96 U. S. 595; *Antoni v. Greenhow*, 107 U. S. 769; *Von Baumbach v. Bade*, 9 Wis. 510.

Fred W. Reed and Brooks & Hendrix, for respondents.

The tender of the amount required to redeem from a mortgage foreclosure sale must be kept good in order to be effectual as the basis of a subsequent action to compel redemption, brought after the time of redemption has expired. *Dunn v. Hunt*, 63 Minn. 484. Laws 1895, c. 326, being enacted after the rights of defendant Dewey had become vested, is void. See *Hillebert v. Porter*, 28 Minn. 496; *O'Brien v. Krenz*, 36 Minn. 136; *Barnitz v. Beverly*, 163 U. S. 118.

CANTY, J.

These are appeals from orders sustaining demurrers to the complaint on the ground that it does not state a cause of action. There were three liens on the real estate in question. The first two were judgment liens, and the third a mortgage lien. There are, in fact, three mortgages, all held by plaintiff, and all subsequent to the two judgments; but, for the purposes of this appeal, the three mortgages may be regarded as one.

The land was sold on execution issued on the prior judgment, and bid in by Dewey, the judgment creditor. Just before the year to redeem expired, what appeared to be a notice of intention to redeem under the second judgment was filed, and plaintiff filed a notice of intention to redeem under his mortgage. On the day after the year expired, it was made to appear that the second judgment was transferred by Hathaway, the holder thereof, to Dewey, and that the latter had, on the fifth day after the year, redeemed under this second judgment from his own execution sale.

Plaintiff insisted that he had a right to ignore the pretended no-

tice of intention to redeem and pretended redemption under the second judgment. So, on the fifth day after the year, he paid to Phillips, the sheriff, the amount necessary to redeem from the execution sale, but has never at any time paid or offered to pay the amount of the second judgment.

Clark, the owner of the land, claimed it as his homestead, and claimed that the two judgments were not a lien thereon. Shortly after the execution sale, he commenced an action against Dewey to have that sale declared null and void. That action was not determined until June, 1897, about four months after the year to redeem expired, when the case was decided against Clark; and he appealed to this court, where the decision of the lower court was affirmed on January 6, 1898. *Clark v. Dewey*, 71 Minn. 108, 73 N. W. 639.

By reason of the pendency of the action commenced by Clark, plaintiff, when he paid the sheriff the redemption money as aforesaid, executed to him a bond conditioned for the payment of the interest on said redemption money, pursuant to, and as required by, Laws 1895, c. 326.

The act provides that, in all cases where an action is brought to set aside an execution sale and the time to redeem from the sale may expire before the final determination of the action, any person having the right to redeem may, before the time to redeem expires, deposit with the sheriff the amount necessary to redeem, and execute to him a bond for the payment of the interest on the redemption money as hereinafter specified; and such deposit and bond shall "extend the time for redemption" until thirty days after the final determination of the action, during which time the redemption may be completed by paying the interest due on the redemption money in the meantime.

Within thirty days after the final determination of Clark's action, plaintiff tendered such interest to the sheriff, and demanded that he execute the proper certificate of redemption; but he refused to accept the tender, and refused to execute such certificate. Thereupon this action was brought to compel such redemption.

All of the foregoing facts (except the provisions of said statute) are stated in the complaint.

1. It is further stated that the defendants Webb and Reed con-

spired together to prevent and dissuade plaintiff from redeeming, and, in order to carry out such scheme, Webb filed, in the name of Hathaway, the pretended notice of intention to redeem under the second judgment, and that this was done

“Without the request or knowledge of said Hathaway, and without any authority from him whatsoever.”

These are the only allegations in the complaint which connect Webb with the case. He is a wholly unnecessary and immaterial party in the action to redeem, and, in our opinion, his demurrer was properly sustained.

2. It is further alleged that, in furtherance of said scheme, the defendant Reed, on the next day after Webb filed the notice of intention to redeem, procured from Hathaway an assignment of his judgment to Dewey, and paid Hathaway therefor the sum of \$250, and then filed all the affidavits and documents necessary to make it appear that Dewey had, under said second judgment, redeemed from himself as aforesaid. It is further alleged that all of this was done without the knowledge, consent, request or direction of Dewey, who was in no wise interested therein.

These are all of the allegations which connect Reed with the case. True, it appears from these allegations that Reed was an unauthorized intermeddler, as well as Webb; but, unlike Webb, Reed appears to have an interest in the controversy sufficient to make him a proper, if not a necessary, party. He paid \$250 of his own money for the second judgment, and under the doctrine of resulting trusts, which still applies to personal property (*Baker v. Terrell*, 8 Minn. 165 [195], he appears to be the owner of the land. Then, if plaintiff showed that he is entitled to compel a redemption, the complaint would state a cause of action against Reed.

3. But plaintiff has not shown that he has redeemed, or is entitled to redeem. He does not allege that he has ever produced to the sheriff a certified copy of his mortgage, or an affidavit showing the amount then actually due thereon, as required by G. S. 1894, § 5474. All of the demurrers were therefore properly sustained.

4. It sufficiently appears by the complaint that plaintiff has kept

the tender good. He alleges that he is ready, willing and able to pay to defendant the money so tendered.

5. Said chapter 326 does not impair vested rights, and is constitutional, even as applied to a redemption from a judgment entered and docketed before the passage of that act. It simply provides for a redemption under protest, and a stay of proceedings after the redemption has in fact been made, and, in the form of interest, it provides compensation for the injury caused by that stay. True, the evidence of the redemption—the sheriff's certificate—is not executed until later, but that is immaterial as regards the constitutionality of the law. Neither is it important that the statute says that depositing the redemption money and filing the bond shall "extend the time to redeem."

Orders affirmed.

NATIONAL LIFE INSURANCE COMPANY OF MONTPELIER v. JUDSON
W. LEE and Others.

January 5, 1899.

Nos. 11,255—(78).

**Party-Wall Agreement—Perpetual Covenant Running with Land—
Grantee of One Lot Liable to Owner of Other Lot by Foreclosure of
Mortgage.**

G. was the owner of lot 8, and D. of lot 9; the two lots adjoining each other. Stating facts in their chronological order:

G. mortgaged lot 8 to the plaintiff. G. and D. executed a party-wall contract, by which it was agreed that G., who was about to build on lot 8, might build a wall on the line between the two lots, one-half on each lot; D. and his heirs and assigns to have the right of using the wall, or any part of it, for any building that he or they might thereafter build upon lot 9, provided and upon the express condition that before using the wall he or they should pay to G., his heirs or assigns, one-half of the value of so much of the wall as was so used. The contract further provided that the agreement should be perpetual, and construed as a covenant running with the land. D. conveyed lot 9 to the defendants, subject to the conditions of the party-wall contract. G. died testate, devising lot 8 to his children. Plaintiff foreclosed its mortgage, itself being

the purchaser at the sale,' and, there being no redemption, became the owner of the property. During the year for redemption, defendants erected a building on lot 9, and in so doing used part of the wall, but have never paid for it. Since plaintiff acquired title to lot 8 under the foreclosure, both it and the defendants have, by their acts, elected to adopt, and to continue to use, the wall as a party wall for their respective buildings.

Held, that plaintiff is entitled to recover from the defendants one-half of the value of the part of the wall used by them.

Same—Use of Basement Wall.

The building erected by G. had a basement and basement walls under it. The building erected by defendants had no basement, but its floor joists rested upon, and were supported by, the basement part of the wall erected by G. *Held*, that the basement wall was used by the defendants, and plaintiff was entitled to recover for one-half of its value, as well as of the part of the wall above the surface of the ground used by the defendants.

Action in the district court for Hennepin county to recover one-half the value of a party wall. The cause was tried before Lancaster, J., without a jury, who ordered judgment in favor of plaintiff for \$236.75. From an order denying a motion for a new trial, defendants appealed. Affirmed.

Francis B. Hart, for appellants.

Where a common wall is erected by a tenant for years, although it may be a party wall as between themselves, it creates no easement binding upon the owner of the reversion in fee that can prevent such owner, when the term expires, from dealing with the property as if no such wall had been erected. *Webster v. Stevens*, 5 Duer, 553; *Washburn, Easem.* (4th Ed.) 614. See also *Kimm v. Griffin*, 67 Minn. 25. Plaintiff's mortgage was executed prior to the making of the party-wall agreement. By the foreclosure of the mortgage and the acquisition of title through such foreclosure, the party-wall contract became a nullity as to plaintiff's property, and the covenants made by Glessner, the mortgagor, in the party-wall contract, expired with the foreclosure sale to plaintiff. *King v. McCully*, 38 Pa. St. 76; *Davis v. Connecticut*, 84 Ill. 508; *Shaw v. Heisey*, 48 Iowa, 468; *Ruggles v. First*, 43 Mich. 192; *Gamble v. Horr*, 40 Mich. 561. See also *Pioneer S. & L. Co. v. Farnham*, 50

Minn. 315; American B. & L. Assn. v. Waleen, 52 Minn. 23; American B. & L. Assn. v. Stoneman, 53 Minn. 212; Lawton v. St. Paul P. L. Co., 56 Minn. 353; Dickinson v. Kinney, 5 Minn. 332 (409); James v. Wilder, 25 Minn. 305.

Gilfillan, Willard & Willard, for respondent.

The right to receive this money for the breach of the covenant passes with the land. See *Kimm v. Griffin*, 67 Minn. 25; *Hendricks v. Stark*, 37 N. Y. 106; *Everett v. Edwards*, 149 Mass. 588; *Warner v. Rogers*, 23 Minn. 34; *Kimball v. Lockwood*, 6 R. I. 138; *Carlson v. Presbyterian Board*, 67 Minn. 436.

MITCHELL, J.

The undisputed facts are that one Glessner was the owner of lot 8, and one Day of lot 9; the two lots being contiguous. In June, 1886, Glessner executed to the plaintiff a mortgage on lot 8.

In July, 1886, Glessner and Day entered into a party-wall contract by which it was agreed that Glessner, who was about to erect a building on lot 8, might build a wall on the line between the lots, one-half on his own lot, and one-half on Day's lot; the basement of the wall to be 8½ feet high; Day, his heirs and assigns, to have the right at any time thereafter of joining to and using the wall, both above and below the surface of the ground, and along its whole length, or any part thereof, for any building which he or they might erect on lot 9, provided and upon the express condition that he or they, before using the wall, should pay to Glessner, his heirs or assigns, one-half of the value of so much of the wall as was so used; that, if the parties failed to agree as to the value of the wall, each party should choose one person, and the two thus chosen a third, and the three thus chosen should assess its value, and their decision should be final, and binding upon both parties. It was further provided that,

"If it shall hereafter become necessary to repair or rebuild the whole or any portion of said party wall or walls, the expense of such repairing or rebuilding shall be borne equally by them [the parties], their respective heirs and assigns, as to so much and each portion of said walls as the said parties, their heirs and assigns, shall or may use jointly."

Also "This agreement shall be perpetual and at all times be construed as a covenant running with the land."

Subsequently Day conveyed lot 9, "subject to the conditions of the party-wall contract," and this title is now in the defendants.

Very soon after the execution of this agreement, Glessner erected a building on lot 8, placing half the wall on lot 9, as agreed. In October, 1894, Glessner died testate; having devised lot 8 to his wife for life, with remainder to his children.

In September, 1895, the plaintiff, on default in the conditions of its mortgage, foreclosed, and bid in the property for the amount due. There being no redemption, the plaintiff became the absolute owner of lot 8 in September, 1896. On June 15, 1896, the executrix of Glessner's estate assigned to plaintiff all her interest in any moneys which had or might thereafter accrue to her as executrix under and by virtue of the party-wall contract.

In July and August, 1896, the defendants erected on lot 9 a one-story building, without a basement, and in so doing used a part of the wall; the floor joists resting upon the basement part of the wall. Two arbitrators were appointed by the plaintiff and defendants, respectively, as provided by the party-wall contract, to assess the value of the part of the wall used by the defendants; but the two thus chosen were not able to agree, and never have agreed, upon a third. Both parties are, as must be assumed in the absence of any showing to the contrary, in possession of their respective lots, and are continuing to use the wall as a party wall between their respective buildings.

Upon this state of facts the court ordered judgment in favor of the plaintiff for the value of one-half of that part of the wall used by the defendants, including that part of the basement wall used as a support for the floor joists of the defendants' building, and adjudging the amount to be a specific lien on defendants' lot 9.

It is very clear that the defendants cannot continue to use this wall as a party wall without paying somebody one-half the value of the part used. That one must be either the plaintiff or the devisees of Glessner. As between the parties to the contract, and their privies, the covenants of the party-wall agreement would run

with the land. *Kimm v. Griffin*, 67 Minn. 25, 69 N. W. 634. Hence plaintiff acquired nothing by virtue of the assignment from Glessner's personal representative.

But this is by no means decisive of the case. By the terms of the party-wall contract, the payment of one-half the value—not the cost—of the part of the wall proposed to be used was expressly made a condition precedent to its use. The only fair and rational construction of the contract is that the whole wall was to remain the property of Glessner, his heirs or assigns, subject to the right of Day, his heirs or assigns, to purchase so much of it as he or they might desire to use, by paying one-half of its then value, when—and not till then—he or they would acquire title to one-half of the wall.

This wall was appurtenant to lot 8, and as such all the right, title or interest of Glessner in it passed to plaintiff, under the title to that lot acquired under the foreclosure, which related back to the date of the mortgage. True, Glessner could not create any easements or incumbrances on the lot which would bind the plaintiff. Hence, when plaintiff acquired title, it could have torn down the half of the wall situate on lot 8, which, from the nature of the case, would have destroyed the whole wall. But it had the right to elect to accept and adopt the wall, and to continue to use it as a party wall for its building, and by its acts it has elected to do so. But in doing so it must take the wall with its burdens as well as its benefits, and hence accepted it subject to the right of the defendants to continue, if they so elected, to use the wall as a party wall for their building. This they have, by their acts, elected to do. But in so electing they also must accept the resulting burdens, as well as benefits, and can use the wall only upon making payment to the owner of the wall (the plaintiff, as successor in interest of Glessner, the builder) of half the value of so much of it as they propose to use.

It is further urged that in any event the defendants are not liable to pay half the value of any part of the basement wall, because they have not used it. They may not be using it as beneficially for themselves as if they had put a basement under their building, but we are of opinion that availing themselves of the basement wall

as a support for the joists of their building constitutes a use of it, and renders them liable to pay for it, the same as for the part used above the surface of the ground.

Order affirmed.

CANTY, J. (dissenting).

I concur in the foregoing opinion, so far as it holds that the covenant of Day to pay for the half of the wall, when he should join to it and use it, ran with the land of Glessner until Day, his heirs or assigns, did join to and use the wall. Thereupon the covenant became an absolute promise to pay immediately for work and labor performed in building a party wall for the mutual benefit of both parties, and to pay for the easement thus obtained by Day in the land of Glessner.

Surely, this covenant, after it has become an absolute promise to pay money immediately for a past consideration, will no longer run with the land of the promisee. It follows from this that if Day's grantees had exercised their option to join to the wall, and had joined to it, during the lifetime of Glessner, the sum due would pass to Glessner's personal representatives. But the option was not exercised, and the wall used by such grantees, until after Glessner's death. Therefore the sum due belonged to his devisees.

The foregoing opinion concedes this. But on what principle do the majority transfer to the plaintiff the sum due to these devisees? The majority concede that the covenant to pay this money does not run to plaintiff with the land of Glessner; and yet they allow plaintiff to adopt the party-wall contract, and thereby draw this money to itself. Plaintiff might do as it has done,—adopt the physical conditions it found on the line of its land,—but it had no right to adopt that contract.

The only principle of law under which plaintiff could claim the benefit of the wall is that it was attached to the realty, and for that reason plaintiff could take it with its attendant burdens, but clearly this past-due money will not pass to plaintiff under any such principle. He takes the benefits and burdens of the wall as it stands, not of the contract under which it was built. Glessner built the wall, maintained it, and kept it ready for Day to join to

it. Day's grantees did join to it and use it until the time to redeem from the foreclosure expired.

True, there was during all this time a paramount incumbrance on the land covered by Glessner's half of the wall. The grant of the easement which he had made to Day, and which easement the latter had a right to use on paying as stipulated, is in the nature of a conveyance of real estate, and no covenant against such incumbrance is implied. But Glessner covenanted to maintain on his part the wall perpetually, and that is a covenant against the incumbrance. That incumbrance has been satisfied by the mortgagee in adopting the wall. The defendants must pay the sum due, less the cost of removing the incumbrance. As it cost nothing to remove it, they must pay the devisees in full, or at least all except nominal damages, which they may deduct on account of the existence of the incumbrance.

The mortgagee, at his election, takes the half of the wall attached to his land; but there is no legal principle on which it can be held that the past-due price of the other half on the Day lot is attached to the realty of the Glessner lot, and passes with it to the mortgagee on foreclosure. There is nothing in the distinction made by the majority, between agreeing to pay the original cost of the wall and the value of it at the time Day's grantees attempted to join to it, which should change the result in this case.

In my opinion, plaintiff is not entitled to recover, and the order appealed from should be reversed.

ANDREW BENSON v. CHICAGO, ST. PAUL, MINNEAPOLIS & OMAHA
RAILWAY COMPANY.

January 5, 1899.

Nos. 11,291—(188).

Railway—Injury to Employee—Laws (Wis.) 1893, c. 220—Hand Car.

Laws (Wis.) 1893, c. 220, provides that "every railroad or railway company operating any railroad * * * within this state shall be liable for all damages sustained within this state, by any employee of such company without contributory negligence on his part * * * while any such em-

ployee is so engaged in operating, running, riding upon or switching passenger or freight or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company." *Held*, that the words "or other * * * cars" include hand cars.

Action in the district court for Hennepin county to recover \$1,950 for personal injuries received by plaintiff, while employed in the state of Wisconsin by defendant. From an order, Lancaster, J., sustaining a demurrer to the amended complaint, plaintiff appealed. Reversed.

Arctander & Arctander, for appellant.

The accident having occurred in Wisconsin, plaintiff's right of action depends upon the law of that state. What that law is, is a question of fact. *Herrick v. Minneapolis & St. L. Ry. Co.*, 31 Minn. 11; *Njus v. Chicago, M. & St. P. Ry. Co.*, 47 Minn. 92; *Britton v. Northern P. R. Co.*, 47 Minn. 340. The Wisconsin statute governing actions of this character is the act of 1893 (Wis.) c. 220. The case at bar comes within the meaning of the act. *Smith v. Chicago*, 91 Wis. 503; *Ean v. Chicago*, 95 Wis. 69. A "hand car" is within the meaning of the word "cars" as used in that act. *Ean v. Chicago*, *supra*; *Smith v. St. Paul & D. R. Co.*, 44 Minn. 17; *Steffenson v. Chicago, M. & St. P. Ry. Co.*, 45 Minn. 355; *Slette v. Great Northern Ry. Co.*, 53 Minn. 341.

L. K. Luse and Thomas Wilson, for respondent.

The words "passenger or freight" in the act of 1893 (c. 220), clearly qualify the word "cars," and are in fact, to this extent, a specific enumeration of the cars intended to be included; hence, under the familiar rules of *noscitur a sociis* and *eiusdem generis*, limit the meaning of the words "or other" following the word "freight" in the statute, and preceding the words "trains, engines or cars," to cars of like kind. See *Brown v. Village of Heron Lake*, 67 Minn. 146; *Grimes v. Bryne*, 2 Minn. 72 (89); *Jensen v. State*, 60 Wis. 577; *Bevitt v. Crandall*, 19 Wis. 610; *Neal v. Clark*, 95 U. S. 704.

MITCHELL, J.

This action was brought to recover damages for personal injuries sustained in the state of Wisconsin while the plaintiff, in the performance of his duty as an employee of the defendant, was engaged in propelling a hand car over defendant's railway; the injury being caused by the alleged negligence of other employees of the defendant, in carelessly and without notice running another hand car into and against the one which the plaintiff was propelling.

The action was brought under Laws (Wis.) 1893, c. 220, and the only question is whether the facts alleged in the complaint bring the case within the provisions of this statute. The statute so far as here material, reads as follows:

"Every railroad or railway company operating any railroad or railway, the line of which shall be in whole or in part within this state, shall be liable for all damages sustained within this state, by any employee of such company, without contributory negligence on his part * * * while any such employee is so engaged in operating, running, riding upon or switching passenger or freight or other trains, engines or cars, and while engaged in the performance of his duty as such employee, and which such injury shall have been caused by the carelessness or negligence of any other employee, officer or agent of such company in the discharge of, or for failure to discharge, his duties as such."

Defendant's counsel concede that the facts alleged bring the case within all the conditions of the statute, except that the plaintiff at the time he received the injury was not "engaged in operating, running, riding upon or switching passenger or freight or other trains, engines or cars," within the meaning of the statute,—their particular contention being that the words "or other cars" do not include hand cars; that in view of the connection in which they are used, and under the familiar rules of *noscitur a sociis* and *eiusdem generis*, the words "or other cars" must be limited to cars of like kind to those previously enumerated, viz., "passenger and freight [cars], or other trains and engines,"—that is, to cars used on trains operated on the road, and intended to be propelled, and usually propelled, by steam. And this contention they seek to enforce by the suggestion that in popular speech the words "railway cars," without any qualifying or explanatory prefix, do not include hand cars.

So far as we are advised, this act has come before the supreme court of Wisconsin for consideration only in the cases of *Smith v. Chicago*, 91 Wis. 503, 65 N. W. 183; *Ean v. Chicago*, 95 Wis. 69, 69 N. W. 997; *Andrews v. Chicago*, 96 Wis. 348, 71 N. W. 372; and, by implication, in *Hibbard v. Chicago*, 96 Wis. 443, 71 N. W. 807.

Unfortunately for us, in none of these cases was the question now presented considered or decided. Only two questions as to the construction of the statute seem to be settled by these cases, viz.: (1) That, to bring a case within its provisions, the employee must have received his injuries while "engaged in operating, running, riding upon or switching passenger or freight or other trains, engines or cars"; and (2) that it is immaterial by what kind of power the cars, etc., are being propelled at the time the employee receives the injuries. We have, therefore, to meet the question as *res integra*.

The purpose or aim of all rules of statutory construction is to ascertain the legislative intent. They are all but aids to this end. It is perfectly evident from the general scope of the act, and from the context, that the word "cars" refers only to railroad cars. To that extent it is legitimate to resort to the rules of construction invoked by defendant's counsel. The words "railroad cars," in their general sense, include "hand cars"; for they are constructed and used for running on the lines of rails of a railroad,—being propelled by hand by those riding on them, through the aid of cranks and gearing. They would therefore be within the purview of the statute, unless there is something in the context or in the subject-matter or the object of the act which shows that the legislature did not intend to include them.

It is very manifest that the statute was designed for the protection and benefit of the class of railway employees engaged in operating, running or riding upon railroad cars, trains and engines, while so engaged in the performance of their duty, by giving them a right of action for injuries thus received caused by the negligence of their fellow servants. It doubtless proceeds upon the theory that railway employees, while thus engaged, are exposed to peculiar and extraordinary perils from the negligence of their co-

employees, against which they are, for various reasons, especially unable to protect themselves.

These considerations apply to those operating or riding upon hand cars as well as to those operating or riding upon any other railroad cars,—not to the same degree, perhaps, as to dangers connected with the motive power of the car operated or ridden upon, but to an even greater extent as to dangers resulting from the negligence of those operating or running other cars, trains or engines. In short, operating, running or riding upon hand cars is “within the mischief” of the statute, and there is apparently no good reason why the legislature should have excluded it. This is not necessarily conclusive, but it is a good reason why a court should not exclude it by construction, unless it is clear from the language of the statute that the legislature so intended. We find nothing in the statute that would justify a court in holding that the legislature intended to exclude hand cars from its operation.

A court has no right to resort to the maxims of *noscitur a sociis* or *eiusdem generis* for the purpose of reading into a statute a distinction which the legislature neither made nor intended to make. These rules are not the masters of the courts, but merely their servants, to aid them in ascertaining the legislative intent. They afford a mere suggestion to the judicial mind that, where it clearly appears that the lawmakers were thinking of a particular class of persons or objects, their words of more general description may not have been intended to embrace any other than those within the class. Hand cars are used in the ordinary business of railroads. As already suggested, their use is within the mischief of the statute.

There is nothing in the statute requiring that the car be connected with a locomotive, or with other cars forming a train, or that it must be made to be propelled by any particular kind of power, in order to bring a case within its operation. We do not think that the fact that the word “cars” is enumerated with “trains” and “engines” restricts its meaning to cars propelled by engines, or to cars usually operated as part of a train. Eliminating, as we think we may for present purposes, the words “trains” and “en-

gines," this clause would read, "while engaged in operating," etc., "passenger or freight or other cars."

Order reversed.

75 168
173 205

FREDERICK N. DICKSON and Another v. ALFRED S. KITTSO and Another.

January 5, 1899.

Nos. 11,336—(186).

Trustee of Savings Bank.

The trustees of a savings association occupy a fiduciary relation to its depositors.

Agreement to Elect Trustee—Public Policy—Consideration.

An agreement by a trustee, for a consideration moving to himself, to secure the election of another to the office of trustee, constitutes a breach of trust, and is void on grounds of public policy; and a promissory note given for such a promise is void, being founded on an illegal consideration.

Promissory Notes—Knowledge of Bank.

In this case the trustee took the notes, given in consideration of such agreement, payable directly to the association, and then transferred them to it; the trustees who accepted them having full knowledge of the consideration for which they were given. *Held*, that the association stood in no better position than the trustee to whom they were given.

Defense Good against Insolvent Good against His Assignee.

Except as otherwise provided by statute as to conveyances by the debtor in fraud of his creditors, and as to unlawful preferences by him of one creditor over others, an assignee in a general assignment for the benefit of creditors stands in the shoes of his assignor, and what would be a defense against the latter will be a good defense against the former.

Maker not Estopped to Set up Illegality of Notes.

Held, also, that upon the facts of this case the maker of the notes was not estopped to set up their illegality as a defense to a suit by the assignee of the association, or by receivers appointed by the court in place of the original assignee.

Action in the district court for Ramsey county by the receivers

of the Minnesota Savings Bank to recover \$16,879.55 upon a promissory note. The cause was tried before O. B. Lewis, J., with a jury. The court directed a verdict in favor of plaintiffs against defendant Kittson for the sum of \$19,817.66. From an order denying a motion for judgment notwithstanding the verdict, or for a new trial, defendant Kittson appealed. Reversed.

J. J. McCafferty, H. Weiss and Samuel Morrison, for appellant.

The notes are void for want of consideration, because Bickel's contract could not legally be executed or performed by him. 3 Am. & Eng. Enc. 897; *Stevens v. Coon*, 1 Pinney, 356. The charter, franchise, business, good will and profits of the bank were not assignable. 1 Morawetz, Corp. § 422; 5 Thompson, Corp. § 6471; *Fietsam v. Hay*, 122 Ill. 293. That portion of Bickel's contract wherein he agrees to manipulate the organization of the board of trustees of the bank was illegal and void on the ground of public policy, as being a breach of trust on the part of Bickel. See *Gage v. Fisher*, 5 N. D. 297; *Woodruff v. Wentworth*, 133 Mass. 309; *Noel v. Drake*, 28 Kan. 265; *Forbes v. McDonald*, 54 Cal. 98; *Cones v. Russell*, 48 N. J. Eq. 208. An assignee for the benefit of creditors cannot assert any better rights than his assignor had before the assignment. *Goff v. Kelly*, 74 Fed. 327.

Frederick N. Dickson and Timothy D. Sheehan, for respondents.

Fraud cannot be predicated simply upon misrepresentations as to the legal effect of written instruments, there being no misunderstanding as to their contents. *Jaggar v. Winslow*, 30 Minn. 263; *Catlin v. Fletcher*, 9 Minn. 75 (85); 8 Am. & Eng. Enc. (1st Ed.) 636. To constitute actionable fraud, a misrepresentation must be of a fact at the time, or previously, existing and not a mere promise for the future. *Id.* 637. The primary franchise of a corporation always vests in and belongs to the individuals who constitute the corporation. 4 Thompson, Corp. §§ 5336, 5353. And may be alienated at will. *Id.* §§ 5353, 5354. The breach of Bickel's promise constitutes no defense to this action. See *Lough v. Bragg*, 18 Minn. 106 (121); *Vanstrum v. Liljengren*, 37 Minn. 191; *Turner v. Rogers*, 121 Mass. 12; *Waterhouse v. Kendall*, 11 Cush. 128; *Davis*

v. McCready, 17 N. Y. 230; Maas v. Chatfield, 90 N. Y. 303; Jaggar v. Winslow, *supra*.

MITCHELL, J.

The Minnesota Savings Bank of St. Paul was a savings association organized under Laws 1867, c. 23. William F. Bickel was its vice president, general manager and one of its five trustees. On January 3, 1895, Bickel and the defendants entered into a written agreement whereby, in consideration of \$22,000 to be paid by the latter to the former, Bickel agreed

"To assign, set over, transfer, sell and deliver to [the defendants] an undivided one-half interest in and to the charter, franchise, business, good will and profits of the Minnesota Savings Bank," and "to effect and cause to be effected whatever proceedings and things that shall be necessary to be had and done to give and deliver to [the defendants] said full undivided one-half interest above described, and shall place the organization of the board of trustees of said corporation in such condition that shall give effect to said agreement."

The defendants, on their part, agreed "to nominate their proportion of said board of trustees"; and it was mutually agreed that

"The nomination and election and qualification thereof [defendants' proportion of the board of trustees] shall constitute an acceptance and fulfilment of this contract"

On part of Bickel. As the consideration for this contract, the defendants executed and delivered to Bickel their promissory notes for \$22,000.

Instead of taking these notes payable to himself, Bickel caused them to be made payable to the order of the savings bank. He then turned them over to the bank, and on receipt of them the board of trustees transferred or surrendered to him certain assets of the bank (of the amount or value of which there is no evidence), which he has retained and appropriated to his own use. These notes, and notes given in renewal of some of them, were entered and carried on the books of the bank as part of its bills receivable up to and at the time the bank failed and closed its doors, on January 18, 1897.

At a meeting of the board of trustees held a few days after the

notes were executed, and on the next day after Bickel had turned them over to the bank, at the instance of Bickel two of their number resigned, and the two defendants were elected trustees in their places. The defendants accepted and qualified and acted as trustees, to the extent, at least, of occasionally attending the meetings of the board, until the bank failed.

For seven or eight months in 1895 the defendant Kittson was on the pay roll of the bank as a salaried employee; his duties being, nominally, at least, to look after the real estate belonging to the bank.

There was evidence tending to prove that the defendant Kittson knew that the notes were held by the bank as part of its assets, but there was no evidence that he knew that the bank had ever parted with anything of value for them. He never paid anything on them, but on one occasion gave a renewal note for one of them, and on another gave a note for accrued interest on the original notes. He never took any steps to rescind the agreement with Bickel, or to recover his notes, and, so far as appears, never repudiated his liability upon them, until this action was commenced.

On January 18, 1897, the bank closed its doors, and executed to one William Bickel an assignment of all its assets for the benefit of its creditors. The assignee having resigned, the court appointed the plaintiffs receivers in his place; and they brought this action upon the notes, but Kittson alone was served with process, or appeared in the action. He interposed as defenses his incapacity to contract, by reason of drunkenness, false and fraudulent representations by Bickel and his co-defendant, Baker, and the want of any good or valid consideration for the notes. We find it unnecessary to consider any of these defenses, except the last.

When the evidence closed, each party requested the court to direct a verdict in their or his favor, whereupon the court directed a verdict in favor of the plaintiffs, to which the defendant excepted, and, after verdict, moved the court for judgment notwithstanding the verdict, and, in case that was denied, for a new trial. The court refused to grant either, and thereupon the defendant appealed.

1. In view of the fact that a savings association organized under

the act of 1867 has no capital stock, and that the nature of its business and the extent of its powers, as fixed by statute, are

To receive deposits "and invest the same for the use, interest and advantage of the said depositors,"

And the further fact that neither the corporate franchise nor the office of trustee is assignable, it may admit of argument as to what, if any, right of property a trustee has in either the franchise or the assets of such an association, which he can assign. But assuming, as we shall, that there was a consideration for the notes, it was clearly an illegal one, on the ground that it was against public policy.

While, on the face of the written agreement, Bickel agrees to assign and transfer to Kittson and Baker an undivided half interest in the bank, yet, upon reading the whole instrument, the sole and only means by which this was to be accomplished was by bringing about a change in the organization of the board of trustees. Hence, when reduced to its last analysis, the sole consideration for these notes was Bickel's agreement to secure the election of Kittson and Baker, or those whom they might designate, to the office of trustees of the bank. The agreement expressly provides that this should constitute a fulfilment of the contract on Bickel's part. This was clearly an illegal agreement.

The office of trustee of an association of this kind is a fiduciary one of the most sacred character. The incumbents of such an office are trustees for the depositors. Their fiduciary relation extends, not merely to the investment of deposits, but also and equally to the election of other trustees, who, with themselves, are to care for and look after the interests of depositors. It is a part of their trust duty to exercise this power of election, not for their own personal advantage, but for the best interests of depositors, and to see that, as far as in them lies, they secure the highest attainable degree of integrity, ability and fidelity for the management of the affairs of the association. No greater breach of trust can be conceived than that of trustees of such associations selling or bartering the office of trustee for their own private gain, without regard to the interests of their cestuis que trustent, the depositors.

And there could not well be any more flagrant example of this than is disclosed by the record in this case, when Bickel, for his own private gain, with the consent and assistance of his colleagues, secured the election to the office of trustee of a dissipated spendthrift of the age of 21 years, without either business ability or experience, and of another who must have been almost equally unfit for the position; for, from what appears in the record, he must have been either as devoid of business sense and judgment as Kittson, or else the fraudulent accomplice of Bickel to inveigle Kittson into this most foolish and improvident bargain. The contract between Bickel and the defendants was manifestly void on grounds of public policy, and the notes were equally void because given for an illegal consideration.

2. The bank stood in no better position than Bickel. It did not occupy the position of an innocent indorsee, for the notes were made payable directly to it. Moreover, the evidence discloses that the trustees knew all about the agreement between Bickel and the defendants, and what the consideration for the notes was, before they took them from Bickel. Knowing the facts, it is immaterial that they may not have understood the law applicable to those facts.

The plaintiffs, as receivers, stood in the shoes of the original assignee; and an assignee for the benefit of creditors stands in no better position than his assignor, and what would be a defense against the latter will be a good defense against the former, except so far as his rights and powers are changed by statute. Our statute¹ provides that, in general assignments for the benefit of creditors, the assignee represents the rights of creditors, as against all transfers of property by the debtor which would be held to be fraudulent or void as to creditors; and the insolvent act of 1881 gives an assignee or receiver the right to bring an action to avoid an unlawful preference of one creditor over another.² Otherwise their rights and powers, so far as here material, are the same as at common law.

There is nothing in the facts of this case to bring it within either

¹ G. S. 1894, § 4233.

² G. S. 1894, § 4243.

of these statutory provisions. Neither is there anything in the facts upon which the doctrine of equitable estoppel can be successfully invoked. We have set out in our statement of facts everything which could have any possible bearing upon that subject.

Order reversed, and cause remanded, with directions to the court below to render judgment in favor of the defendant notwithstanding the verdict.

**BOARD OF COUNTY COMMISSIONERS OF ST. LOUIS COUNTY v.
SECURITY BANK OF DULUTH and Others.**

January 5, 1899.

Nos. 11,358—(135).

**County Funds—Deposit in Bank—Certificate of Deposit—G. S. 1894, §§
729-735.**

A bank having been designated a depository of county funds pursuant to G. S. 1894, §§ 729-735, executed to the county a bond, with sureties, conditioned to pay interest on monthly balances of the money deposited at the rate of 2 per cent. per annum, and to hold the money and interest subject to draft, and payable at all times on demand. During the life of the bond the county treasurer, with the knowledge and consent of the board of county commissioners, deposited in the bank money belonging to the county which was part of a sinking fund accumulated to meet future maturing obligations of the county, and took therefor a certificate of deposit payable in six months, with interest at 3 per cent. per annum. *Held*, that the only authority of the county treasurer or the board of county commissioners to deposit or lend county funds is that conferred by statute, viz., payable on demand, with interest in accordance with the proposal of the bank to the county commissioners; that, notwithstanding the attempt to attach to the deposit terms not authorized by law, the money deposited as above must be deemed a deposit under the statute, payable on demand, for which, with interest at 2 per cent., the sureties on the bond are liable.

Insolvency of Bank—Failure to File Claim—Sureties not Released.

The bank, being largely indebted to the county, became insolvent, and upon the petition of the state bank examiner a receiver of all its assets was appointed pursuant to the provisions of Laws 1895, c. 145. The board of county commissioners neglected to file the claim of the county

75	174
175	493
75	174
77	63

against the bank within the time limited for that purpose in the insolvency proceedings. The sureties never requested that the county should file its claim. *Held*, that the mere failure of the county officials to file the claim against the bank did not release the sureties either in toto or pro tanto.

Action in the district court for St. Louis county to recover \$49,513.90, upon a bond given to the county of St. Louis to secure the payment of county funds deposited in defendant bank. Defendants Joseph Sellwood and Frederick W. Paine, as sureties on the bond in suit, answered. The cause was tried before Moer, J., without a jury, who ordered judgment in favor of plaintiff. From an order denying a new trial, defendants Sellwood and Paine appealed. Affirmed.

Billson, Congdon & Dickinson, for appellants.

These appellants are not responsible, as sureties on the bond, for so much of the deposit in the bank as was represented by the certificate of deposit. That deposit was never within the terms and condition of the bond, or, if it was, then the contract conditions as to payment were changed by the taking of the certificate of deposit, payable six months after date instead of on demand, and at 3 per cent. instead of at 2; and by such change the sureties were discharged. A surety has a right to stand upon the very terms of his contract. *Simonson v. Grant*, 36 Minn. 439. The position of a surety is one strictissimi juris and the contract is to be construed most favorably to him. *Detroit v. Ziegler*, 49 Mich. 157.

The taking of the certificate was in express violation of the bond, as it extended the time of payment and suspended until maturity of the certificate the right of plaintiff to recover the money, and thereby the sureties were discharged. See *Lundberg v. N. W. Elevator Co.*, 42 Minn. 37; *Flenniken v. Liscoe*, 64 Minn. 269; 2 Brandt, Sur. 363. Consent to a change in the conditions of the bond is not to be inferred merely from a knowledge of the change on the part of the surety, and forbearance or failure on his part to object or protest. *Stewart v. Parker*, 55 Ga. 656; *Executors v. Brown*, 12 Ga. 271; *Lambert v. Shetler*, 71 Iowa, 463; *Edward v. Coleman*, 6 T. B. Mon. 567; 2 Brandt, Sur. § 426. G. S. 1894, § 729,

was not intended to prevent the county from making time deposits, or from making contracts such as was expressed in the certificate in question, providing for a higher rate of interest on such time deposits. Such an intention would not have been expressed in language of such doubtful import as that used.

The plaintiff owed to the sureties the duty of filing its claim in the insolvency proceeding against the bank, so as to participate in the distribution of the estate of the insolvent principal debtor; and by reason of its neglect of this duty the sureties are discharged, at least to the extent of the amount which might have been realized from such distribution. 2 Brandt, Sur. §§ 426-445; Huey v. Pinney, 5 Minn. 246 (310); Joslyn v. Eastman, 46 Vt. 258; White v. Life, 63 Ala. 419; Siebert v. Quesnel, 65 Minn. 107; McCollum v. Hinckley, 9 Vt. 143; Gillespie v. Darwin, 6 Heisk. 21; Clow v. Derby, 98 Pa. St. 432; Willis v. Davis, 3 Minn. 1 (17).

George E. Arbury, for respondent.

The county treasurer, the scope of whose authority is fixed by law, can only bind the county by his acts or representations while acting within the scope of his powers. When he received the certificate of deposit, he was acting entirely beyond the scope of his authority, and the contract with the bank in that behalf was void, and did not alter the contract upon which the sureties of the bank are bound. In order that a contract of a public officer shall be binding upon the public, the officer must keep within the limits of his authority. Story, Ag. § 307a; 19 Am. & Eng. Enc. 507; Mitchell v. Board of Co. Commrs., 24 Minn. 459. There was no ratification by the county commissioners of this unauthorized act of the treasurer. See Mayor v. Reynolds, 20 Md. 1; Boom v. City, 2 Barb. 104. The failure of the county officials to file a claim in the insolvency proceedings of the bank so as to participate in the assets, did not release the sureties as to the whole or part of the bond. See 4 Am. & Eng. Enc. 367; Board v. Mighels, 7 Oh. St. 109; Wehn v. Commrs., 5 Neb. 494; Clark v. Adair, 79 Mo. 536; Sutton v. Board, 41 Miss. 236; Soper v. Henry, 26 Iowa, 264; White v. County, 58 Ill. 297. See also Com. v. Brice, 22 Pa. St. 211; Haehnlen v. Com., 13 Pa. St. 617; People v. Jansen, 7 Johns. 332.

MITCHELL, J.

In an action on a bond given by the Security Bank of Duluth as a depository of county funds pursuant to G. S. 1894, § 730, two of the sureties interposed two partial defenses, viz.: First, that a part of the deposit, represented by a time certificate of deposit, was not within the conditions of the bond; and, second, that by reason of the failure of the county to file and prove its claim against the estate of the insolvent bank within the time for so doing as fixed by the court, the sureties had been released pro tanto,—that is, to the extent of the dividend which the county would have realized from the assets of the bank.

1. The bank was designated as a depository of county funds for two years from March 26, 1896. The condition of the bond in suit, which was executed on the day named, and approved on April 17, 1896, was that:

Whereas, the "Security Bank of Duluth has made application to be designated as a depository of the funds of the said county of St. Louis for the term of two years from the date hereof, and has agreed to pay interest on such funds of said county as shall be deposited with said bank at the rate of two per cent. per annum upon the monthly balances of such deposits, such interest to be accounted for according to law, and credited on the first day of each month.

"Now, therefore, if the above-bounden, the Security Bank of Duluth, * * * shall well and truly credit such interest on such monthly balances to said county, and shall well and truly hold said funds, with accrued interest, subject to draft, and payment at all times on demand, and shall well and truly pay over on demand according to law all of said funds which shall be deposited in said bank pursuant to said designation, and said statutes as aforesaid, and all of the interest so to be credited, then this obligation shall be void, otherwise it shall remain in full force and effect."

The county treasurer of St. Louis county had in his hands over \$13,000, part of a sinking fund belonging to the county, accumulated and held to meet certain future maturing obligations of the county. This money he had deposited in the Security Bank on January 10, 1896, and taken therefrom a time certificate of deposit payable July 1, 1896, with interest at 3 per cent. On the latter date, when this certificate matured, he took another certificate of deposit, in renewal thereof, payable six months after date, with interest at

3 per cent. per annum. This was done with the knowledge of and without objection by the board of county commissioners.

It is the deposit represented by this time certificate which the sureties claim is not within the condition of their bond. This would undoubtedly be so if the county treasurer has authority to make a deposit on such terms, or the board of county commissioners had the power to authorize him to do so; for the bond clearly refers to and covers only deposits subject to draft, payable on demand, and on which the bank was to pay interest on monthly balances at 2 per cent. in accordance with its proposal to the county commissioners pursuant to G. S. 1894, § 731.

The only authority of either the county treasurer or the board of county commissioners to lend county funds (for that is what it amounts to) is that given by Laws 1881, c. 124, as amended (G. S. 1894, §§ 729-735, inclusive). They have no authority to deposit county funds in any other place or on any other terms than those prescribed by the statute. This applies to all county funds, whatever the purpose for which they were raised. It is apparent from various provisions of the statute that it neither contemplates nor authorizes time deposits, and section 729 expressly provides that all deposits are to be on condition that they

“Shall be held subject to draft and payment at all times, on demand”;

And every one is bound to know the law. The Security Bank was bound to receive on deposit, up to the statutory limit, all county funds offered in accordance with the provisions of the statute, and on the terms of its proposal. It is not material that the certificate of July 1 was in renewal of the one issued the previous January, which, according to its terms, matured on that day. The transaction was, in legal effect, a new deposit as of that date, although the idle ceremony of drawing out the money on the first certificate, and then redepositing it, was not gone through with. It constituted a deposit under the statute as of the date of July 1, and was subject to draft and payment on demand, notwithstanding the void and illegal provision as to time of payment attempted to be incorporated into

the contract. The deposit was, therefore, within, and covered by, the conditions of the bond.

The sureties, however, would be liable only for interest on the deposit at 2 per cent. per annum on monthly balances, as in the case of any other moneys deposited. It is hardly necessary to add that what the board of county commissioners could not authorize they could not ratify.

2. The Security Bank having become insolvent, the state bank superintendent on August 11, 1896, instituted insolvency proceedings against it, and upon his petition a receiver of all its property was appointed on the 13th of the same month, pursuant to the provisions of Laws 1895, c. 145, § 20, since which time the administration of its affairs and property has been carried on by the receiver pursuant to law, and under the direction of the court.

At the time the bank failed, it was indebted to the county, for funds deposited (including the certificate already referred to), in the sum of \$49,509.20. In the insolvency proceedings, the court, by order duly made and published, limited the time for filing claims against the bank to February 10, 1897. The county never filed or presented its claim against the bank in the insolvency proceedings, or complied with the conditions necessary to enable it to share in the distribution of the assets of the insolvent bank. This omission was without the knowledge or consent of the sureties on the bond.

The receiver has already paid a dividend of 10 per cent. to those creditors who filed and proved their claims, and there is still in the hands of the receiver assets which, when converted into money, will assure them still further dividends. If the county had filed its claim in the insolvency proceedings, it would have eventually received, in the distribution of the assets of the bank, 40 per cent. of it. The county treasurer demanded payment from the bank on August 11, 1896, the day the bank failed.

Upon the authority of *Siebert v. Quesnel*, 65 Minn. 107, 67 N. W. 803, counsel for the defendants claim, and counsel for the plaintiff seems to concede, that, as between private persons, the failure of the obligee of the bond to file his claim against the estate of the insolvent principal within the time allowed for that purpose would release the sureties pro tanto. For the purposes of this case we

shall assume that this is so, although, in view of the general trend of the authorities, it is at least doubtful whether the mere passive omission of the creditor to file the claim would have any such effect, in the absence of any request by the sureties that it should be filed. See *Johnson v. President*, 4 S. & M. 165; *Bull v. Coe*, 77 Cal. 54, 18 Pac. 808.

Counsel for the defendants urge that this is not a case of suretyship for a public officer, and that the obligation of the defendants does not in any manner relate to the performance of official duties due to the public, and hence that the case must be governed by the rules applicable to private bonds to secure the performance of duties due to private persons. In this counsel are in error. While the bank may not have been a "public officer," in the popular sense of that term, yet in the matter of the county money deposited with it, it was performing public duties, or duties to the public, and pro hac vice was a public officer. Its duty was to the public, and its bond to secure the performance of that duty was for the benefit and protection of the public.

The case falls within all the reasons of the rule, founded on public policy, which makes certain distinctions between the rights and liabilities of sureties on private bonds and sureties on bonds given to secure the performance by public officers of their official duties to the public. The case must be determined by the rules applicable to the latter.

It is familiar law that in taking a bond from a public officer to secure the performance of his official duties the state, or any municipal subdivision of it, does not contract with the sureties against the negligence or misfeasance of other public officials in the performance of their duties designed for the benefit and protection of the public, and hence that such negligence or misfeasance will not release the sureties, although the due performance of such duties might have prevented loss to the public caused by misfeasance of the principal on the bond, and thereby also prevented loss to the sureties. One of the most common examples of the application of this rule is where some public officer or board, having a supervisory power over another officer, has failed to perform his or its duty by examining the books and vouchers of the principal obligor on the

bond, or by requiring him to make reports or settlements at stated periods, as required by law. *U. S. v. Kirkpatrick*, 9 Wheat. 720; *County of Waseca v. Sheehan*, 42 Minn. 57, 43 N. W. 690.

This rule is founded upon a great public policy, and not upon the idea of any extraordinary prerogative on the part of the state. The controversy between counsel is whether the facts in this case bring it within this rule. Comparatively few of the cases cited by the respective counsel are very much in point upon this precise question.

All but two of the authorities cited on behalf of the plaintiff are cases in which it was held that, in the absence of a statute imposing such a liability, counties and towns are not liable for injuries caused by the negligence of their officers or agents in failing to keep highways, bridges, court houses, etc., in a proper state of repair. Such cases are of no aid in deciding this case. The other two cases referred to are *U. S. v. Kirkpatrick*, supra, and *Com. v. Brice*, 22 Pa. St. 211, which clearly fall within the rule.

In all the cases, except one, cited and relied on by counsel for the defendants, there was some affirmative lawful and authorized act binding upon the public, which was held to have released the sureties either in toto or pro tanto. In several of them the state had by legislative act extended the time of payment by the principal obligor on the bond. Of course there could be no question of the power of the legislature to grant the extension. In other cases municipal officers having authority to do so had surrendered to the principal certain collateral securities held for the performance of the same duty or obligation as that secured by the bond, and taken in place of them other securities of less value, and it was held that the sureties were released to the extent of the difference in the value of the securities. In one case the city (the obligee in the bond) had settled with the principal debtor, and released him from all liability. It was, of course, held that the sureties were also released. In some of these cases the question of the authority of the public officials or boards to do, and bind the public by, the affirmative act which was held to release the sureties, was not expressly decided, but this was assumed, and the cases all seem to proceed on that assumption.

The remaining case cited by defendants, and the only one which, in our opinion, at all tends to support their contention, is *Hayden v. Agent*, 1 Sandf. Ch. 195. In that case the state agent had obtained judgment against the debtor of the state, and levied upon sufficient of his personal property to satisfy it, but through the sheriff's indulgence and the state agent's negligence nothing was ever realized out of the property to apply on the execution. It was held that this satisfied the judgment as to subsequent incumbrances upon the debtor's real estate; that the consequences of the state agent's negligence, which would otherwise occasion loss to the junior incumbrancers, was to be borne by the state in the same manner as individuals would bear them under like circumstances.

In *Board v. Otis*, 62 N. Y. 88, this case is cited and distinguished, the court saying: "The agent of the prison represented the state, and had given security for the faithful performance of his duties. But as the authorized attorney of the state his acts bound the state;" thus seeming to construe the conduct of the state agent as constituting not mere negligent nonaction, but an affirmative act, which he had authority to perform, or, at least, which bound the state. The position of counsel for the defendants seems to be that the rule applies only to negligence or misfeasance of other public officers of a character which rendered possible, or contributed to, the default on the part of the principal obligor on the bond.

We have examined many cases in addition to those cited by counsel, and while it is true that the facts in the majority of them bring them within the class suggested, yet we have found no case which thus limits the rule; and we do not think that the reasons of public policy upon which the rule is founded will permit its being thus limited. The general rule as to all kinds of suretyship is that the mere passive failure of the creditor to proceed to collect the debt from the principal will not release the sureties. And it is the general rule as to suretyship on official bonds, given to secure the public, that the negligence or misfeasance of other public officials is not chargeable to the public.

In the present case the conduct of the board of county commissioners was at most merely the negligent omission to perform a

duty which they owed the public, and which, if performed, would have reduced the loss of the sureties.

Upon the findings it must be assumed that the sureties knew that their principal, the bank, had gone into insolvency, indebted to the county; that its assets were being administered by a receiver; that a time had been fixed within which claims had to be filed; that their ignorance that the county had not filed its claim was owing to their failure to make any effort to ascertain what the fact was; and that they never requested the board of county commissioners to file the claim, or to take any action to enable the county to participate in the distribution of the assets of the bank. They were certainly in as good a position to protect themselves as the county officials were to protect them. The indebtedness from the bank to the county had been due and payable from the very day that the bank failed.

The sureties could have paid the debt to the county, and themselves filed the claim against the bank; or, without paying the county, they could, by action or mandamus (at least by action) have compelled the county to file the claim against the bank. But, instead of this, they negligently remained inactive, neither paying their own indebtedness nor doing anything to protect themselves; and now, when it is sought to enforce the obligation of their bond, they seek to evade it by pleading the neglect of the county officials to do what they themselves might and ought to have done, viz., to take active measures to protect themselves. This is inequitable, as well as against public policy, and we do not think that the authorities support any such position.

Order affirmed.

A. C. WILKINSON v. CITY OF CROOKSTON.

January 5, 1899.

Nos. 11,416—(196).

New Trial—Submission of Issue to Jury—Accord and Satisfaction.

A new trial granted on the ground that the trial court submitted to the jury an issue of fact upon which the evidence was conclusive against the respondent, and took from the jury another issue of fact, favorable to respondent, upon which the evidence was not conclusive.

Action in the district court for Polk county to recover \$240.60 for services rendered and expenses paid by plaintiff as attorney for defendant. The cause was tried in June, 1897, before Ives, J., and a jury, which rendered a verdict in favor of plaintiff for \$90. On motion of plaintiff a new trial was granted, and on the second trial the jury rendered a verdict in his favor for \$97.22. Again the motion of the plaintiff for a new trial was granted, and on the third trial the jury rendered a verdict in favor of plaintiff for \$190. From an order, Ives, J., denying defendant's motion for a new trial, defendant appealed. Reversed.

R. J. Montague, for appellant.

A. A. Miller and *A. C. Wilkinson*, for respondent.

MITCHELL, J.

It is to be regretted that there should be a reversal in a case involving a comparatively small amount, and which has been already tried three times, resulting each time in a verdict for the plaintiff, and where it was evident that he is entitled to a verdict for some amount. But there must be a reversal because of manifest error in the charge of the court.

The plaintiff was employed by the defendant as an attorney to assist in the defense of an action brought against it by one Netzer. This present action was brought to recover for professional services rendered and disbursements made in that case. According to the evidence, he assisted in the first trial of the case, and subsequently went to St. Cloud to argue a motion before the trial judge. After these services were performed, he rendered a bill to the city council

for \$60, viz., \$50 for trying the case, and \$10 for going to St. Cloud. This bill the city paid.

He subsequently performed other services in the case, and when these were all performed he rendered to the city another bill (Exhibit E), for \$110, to wit, \$10 for trip to St. Paul, and \$100 for briefing the case and preparing it for argument. The charge of \$10 was not for going to St. Paul to argue the case in this court, but for coming down on the first day of the term to "set the case" for argument. This bill was all for services rendered and expenses incurred subsequent to the rendition and payment of the first bill for \$60.

This last bill the city failed or refused to pay, and thereafter the plaintiff brought this action to recover \$250 for his entire services, and \$50.60 for his entire disbursements, in the case, less the \$60 paid.

We shall not stop to discuss the evidence at length. We will merely say that upon the evidence presented by the record the court should have instructed the jury that the presentation and payment of the bill for \$60 constituted a full settlement and an accord and satisfaction of all services and disbursements rendered or made prior to that date, and that the court erred in submitting that question to the jury.

As to the charge made for going to St. Paul to "set the case," the most favorable view for the plaintiff to take of the evidence is that it made a case for the jury; and hence the court erred in charging the jury, as a matter of law, that he was entitled to recover for that part of his claim.

We might add, with a view to another trial, that the plaintiff is in no way estopped as to the value of his services by rendering the bill for \$110. The only pertinency of that act would be as an admission of the plaintiff (capable, however, of explanation in rebuttal) as to the value of his services. As there is no way of ascertaining how much of the verdict may have been on account of services rendered prior to the rendering of the bill for \$60, or on account of the trip to St. Paul, a new trial of the whole case becomes necessary.

Order reversed.

**SOUTH PARK FOUNDRY & MACHINE COMPANY and Others v.
CHICAGO GREAT WESTERN RAILWAY COMPANY.**

January 5, 1899.

Nos. 11,436—(198).

Insolvent Bank—Deposit of Draft for Collection—Credit before Collection—In re State Bank Followed.

Held, following doctrine of *In re State Bank*, 56 Minn. 119, that the evidence justified the trial court in finding that a draft delivered by the drawer to his bank, and for which he received credit on his account, was delivered for "collection and credit," and that the credit before collection was merely provisional, and, hence, that the title to the draft did not pass absolutely to the bank.

Petition by the South Park Foundry & Machine Company to the district court for Ramsey county in the matter of the receivership for the insolvent Bank of Minnesota. The receivers of the bank and the Chicago Great Western Railway Company were ordered to show cause why the petition should not be granted. The facts are given in the opinion. From an order, O. B. Lewis, J., granting petitioner's application, the railway company appealed. Affirmed.

Daniel W. Lawler and John M. Blakeley, for appellant.

McLaughlin & Boyesen, for respondent.

MITCHELL, J.

The South Park Foundry & Machine Company (hereinafter called the "Machine Company") and the Chicago Great Western Railway Company (hereinafter called the "Railway Company") were, and for years had been, customers of the Bank of Minnesota (hereinafter called the "Bank"), with which each of them had an open and current bank account, subject to check.

On December 7, 1896, the Machine Company drew its draft for \$910.71, payable in 30 days to its own order, on the Railway Company, which the Railway Company accepted on the same day. On the next day the Machine Company indorsed the draft, by an unrestricted indorsement, and delivered the same to the Bank, which credited the Machine Company with the amount (less interest to

maturity at 8 per cent.) on its pass book, and on its open and current account in the books of the Bank.

According to the usual course of business, the Machine Company had the privilege of checking against this credit, but as a matter of fact it never exercised the privilege, but had at all times subsequent to this deposit, and at the time the Bank closed its doors, on December 22, a sum to its credit much larger than the amount of the draft.

On the date last named, the Bank being insolvent, the superintendent of banks took possession of its assets, and, upon his petition, receivers of the same were appointed, pursuant to statute. The draft referred to (which was among the assets of the Bank, and not yet due) came into the possession of the receivers.

At the time the Bank closed its doors there was due from it to the Railway Company on its open account a sum in excess of the amount of the draft. The Railway Company refused to pay the draft when it matured, claiming the right to set off against it the amount due to it from the Bank on its deposit account. The Machine Company then appeared in the receivership proceedings, and asked the court to order the receivers to return the draft to it, and charge the amount back against its deposit account. The receivers submitted the facts to the court, and asked its instructions in the premises. The Railway Company, upon the order of the court, appeared, and asked that the petition of the Machine Company be denied, and that the receivers be instructed to charge and offset the amount of the draft against the indebtedness of the Bank to it on its deposit account.

After hearing the evidence the court made its findings of fact and conclusions of-law, granting the petition of the Machine Company, and directing the receivers to return the draft to it and charge the amount to its account. From this order the Railway Company appealed.

The court found certain facts, but the substance of them all is to the effect that the draft was delivered to the Bank by the Machine Company for collection and credit, that the credit at the time of the deposit was merely provisional, and, therefore, that the title of the draft never passed from the Machine Company to the Bank.

Under the assignments of error, the only question is whether the evidence justified the findings.

There is evidence that the Machine Company's pass book, which was in the form which had been in common use by the Bank with its depositors for several years, contained on its first page the following notice:

"This bank, in receiving checks or drafts on deposit or for collection, acts only as your agent, and, beyond carefulness in selecting agents at other points, and in forwarding to them, assumes no responsibility;"

That the Machine Company had for years been in the habit of delivering drafts to the Bank, and receiving credit for them on its pass books containing this notice.

It also appeared from the evidence that it had been the usual custom of the Bank, when a draft deposited by a customer, as in this case, was not paid in the usual course of business by the drawee or acceptor, to charge it back to the customer who deposited it, and that the Machine Company knew that this was the rule and custom of the Bank. There was no evidence that in making deposits of drafts the Machine Company ever objected to the terms of the notice contained in its pass book, or to the known custom of the Bank, already referred to, or that it deposited the draft in question under any special agreement.

The rules of law applicable to the case are so fully considered in *Re State Bank*, 56 Minn. 119, 57 N. W. 336, that it is unnecessary to repeat them. Neither can we discover any material distinction between the facts in that case and those in the present one.

The suggestion is made that the notice in the pass book applies only to drafts payable at points outside of St. Paul. The language of the rule will not admit of this construction.

Reference is also made to the fact that at the maturity of the draft the Machine Company, at the instance of the receivers, waived protest. We discover no particular significance in this, especially when accompanied by a request for a return of the draft. The receivers evidently desired the waiver, as a precautionary measure, to avoid any question being raised with reference to the nature of

the transaction, and the Machine Company gave it at their request.

It is also claimed that there is no evidence that the Machine Company ever assented to the terms of the notice in its pass book, or to the custom of the Bank. It certainly impliedly assented, by not objecting, although it knew of both. It is true that there was no evidence of any particular instance where the Bank charged a draft deposited in this way to the account of the Machine Company, but it does not appear that there was ever any occasion for doing so. Indeed, it affirmatively appears that, so far as the Railway Company is concerned, it always paid its acceptances at maturity. Our conclusion is that the evidence justified the findings of the trial court.

Order affirmed.

HENRY H. SMITH and Another v. HENRY H. FLETCHER.

January 5, 1899.

Nos. 11,474—(199).

75	189
82	185
82	186

Mortgage—Authority to Accept Payment—Ratification—Evidence.

The issues in this case were whether K. had original authority, as agent of the defendant, to receive and accept payment of a certain mortgage, and, if not, whether the defendant had subsequently ratified K.'s act. *Held*, that upon the evidence the trial court was justified in finding both issues in the negative.

Ratification by Inaction—Estoppel.

Implied ratification by mere silence or inaction, after knowledge of the unauthorized act of an assumed agent, proceeds upon the doctrine of equitable estoppel.

Same—Evidence—Effect on Third Persons.

Mere silence or nonaction, after knowledge, is evidence of ratification, but is not conclusive, except when the protection of the assumed agent or of third parties requires it; that is, where the facts are such that the law will presume that the agent or a third party would be prejudiced by the delay to speak or act, if the principal should thereafter be permitted to assert that he had not authorized or ratified the act.

New Trial—Evidence of Act Subsequent to Trial.

Held, also, that, upon the facts, the trial court did not err in refusing to grant a new trial for the purpose of giving the plaintiffs an opportunity to introduce evidence of an act of the defendant tending to prove ratification, committed 18 months after this action had been tried and decided.

Action in the district court for Hennepin county to enjoin the foreclosure of a mortgage and obtain a decree that the same had been paid and satisfied. Defendant prayed for the foreclosure of the mortgage. The cause was tried before McGee, J., without a jury, who ordered judgment in favor of defendant for \$400 and interest, and for a foreclosure of the mortgage. From an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

John M. Rees, for appellants.

When the principal is informed of what has been done by the agent, if the principal disapprove he must dissent and give notice of it in a reasonable time, and if he does not do so, his assent and ratification will be presumed. 2 Kent, Com. 216. From the unauthorized act of an agent done in execution of the power granted, but in a mode not sanctioned and in excess and misuse of it, ratification is implied, and it is the imperative duty of the party to disaffirm it at once; otherwise he is bound by it. *Myers v. Mutual*, 32 Hun, 321; *Law v. Cross*, 1 Black (U. S.) 533. If the rights of third parties depend upon the principal's election, he is bound to repudiate or disaffirm the acts of the agent within a reasonable time after knowledge thereof; and if he does not so dissent, his silence will afford conclusive evidence of his approval. *Triggs v. Jones*, 46 Minn. 277. See also 1 Am. & Eng. Enc. (2d Ed.) 1198; *Bearce v. Bowker*, 115 Mass. 129; *McWhinne v. Martin*, 77 Wis. 182; *Hoosac v. Donat*, 10 Colo. 529; *Perkins v. Boothby*, 71 Me. 91; *Benson v. Liggett*, 78 Ind. 452.

One who knowingly allows another to collect for him, is bound by payments made to the other. 1 Am. & Eng. Enc. (2d Ed.) 960; *Sax v. Drake*, 69 Iowa, 760; *Quinn v. Dresbach*, 75 Cal. 159; *Simon v. Brown*, 38 Mich. 552. See also *Friesenhahn v. Bushnell*, 47 Minn. 443; *Neibles v. Minneapolis & St. L. Ry. Co.*, 37 Minn. 151; *Tice v.*

Russell, 43 Minn. 66; Fowlds v. Evans, 52 Minn. 551; Wilcox v. Chicago, M. & St. P. Ry. Co., 24 Minn. 269; Hare v. Bailey, 73 Minn. 409.

Hahn, Belden & Hawley, for respondent.

A general authority to collect would not authorize this collection. See *Smith v. Kidd*, 68 N. Y. 130; *Mechem*, Ag. § 380. The acts claimed to effect a ratification must be of such a nature that the rights of the other party who has relied upon them will be prejudiced if a ratification has not taken place. *Mechem*, Ag. §§ 131, 155, 156, 157.

MITCHELL, J.

This is still another of the "Kelley Cases." The plaintiffs, on January 16, 1896, paid to A. F. & L. E. Kelley the sum of \$300, to apply on the principal of a note, secured by a mortgage, given by them to defendant. This was more than a year before the money became due, according to the terms of the mortgage as extended. Neither the note nor the mortgage were in the possession of the Kelleys, but were in the possession of the defendant, in Vermont, where they had always remained after they were transmitted to him, in 1889, soon after their execution.

The Kelleys never paid or accounted for the money to the defendant; and the principal question on this appeal is whether the evidence justified the trial court in finding that,

"Neither A. F. & L. E. Kelley, nor either of the members of the firm, were ever the agents of the defendant to receive or to collect, or were ever authorized by him to receive or collect, any part of the principal of said note."

As we have arrived at the conclusion that the finding was justified, we shall not attempt to discuss the evidence at length. It is sufficient to state generally that there was no evidence which required, even if it would have justified, a finding that the defendant had ever clothed the Kelleys with either actual or apparent authority to collect the money on his mortgage loans, except where he had transmitted to them the principal or coupon notes for the purpose of collection.

Much stress is laid by counsel upon the instructions given to the Kelleys, and the knowledge of their mode of doing business, acquired by one Aldrich, who, as we will assume for the purposes of this case, was the general agent of the defendant. We find nothing in these instructions that proved (certainly not conclusively) authority to the Kelleys either to receive payment before maturity, or to collect money, except where the securities were transmitted to them for that purpose. Stress is also laid on the evidence tending to show that Aldrich examined the account kept by the Kelleys in their books with defendant; but we discover nothing, and counsel have not pointed out anything, in this account, tending to advise Aldrich that the Kelleys were in the habit of collecting money on defendant's mortgages when the notes and mortgages had not been previously transmitted to them for that purpose.

The plaintiffs had to rely mainly upon the testimony of A. F. Kelley. As usual, his testimony was all in the air, indefinite and evasive, consisting principally of mere conclusions, inferences and "understandings," which, when analyzed, are found to be supported by a very small foundation of fact.

On the other hand, there was the positive testimony of both defendant and Aldrich to the effect that neither of them ever authorized the Kelleys, by correspondence or otherwise, to collect money, except where the note was first sent to them, and the correspondence of Aldrich with the Kelleys, which is in evidence, tends strongly to corroborate their testimony.

2. The Kelleys became insolvent, and made a general assignment for the benefit of their creditors, September 12, 1896. Subsequently, and some time during the same month, one of the plaintiffs wrote to the defendant. This letter was not introduced on the trial, and all that the record discloses as to its contents is that plaintiffs made inquiry whether the \$300 paid to the Kelleys had been credited on the note, and requested the defendant "to put in [his] claim against the Kelley estate, to save [the plaintiffs] trouble to prove the payment." Defendant did not answer this letter, but sent it to a Mr. C. H. Smith, an attorney in Minneapolis, requesting him "to look the matter up."

So far as appears from the evidence, defendant did nothing by

way of an express disavowal or repudiation of the Kelleys' act until he commenced foreclosure of the mortgage for its full amount, when it fell due, on the 9th of the following February. It is claimed that this failure of defendant to expressly repudiate and disavow the Kelleys' act for so long a time after he was informed of what they had done, amounted, in law, to an implied ratification of their act.

It does not appear, certainly not conclusively, that this letter conveyed information to the defendant that the Kelleys had assumed to collect or receive the \$300 as his agents. If not, there was nothing which he was called on to repudiate or disavow. For anything that was disclosed by the letter, the money might have been paid to and received by the Kelleys as plaintiffs' agents. In view of the language in which the request to prove the claim against the Kelleys' estate was expressed, it might be construed as a request that this should be done for the accommodation or benefit of the plaintiffs themselves, in order to avoid or reduce the loss. But we are not inclined to rest the decision of this point on this ground.

If the letter is to be construed as amounting to notice that the Kelleys had assumed to act as defendant's agents in receiving the money, the omission of the latter promptly to make an express disavowal of their authority to do so would be an item of evidence more or less in the nature of an implied admission, which a court should take into consideration, with the other evidence, in determining whether the Kelleys had original authority to receive the money. It might also be evidence tending to prove ratification, but, under the facts of the case, by no means conclusive.

Ratification, like authorization, is generally the creature of intent; but that intent may often be presumed by the law from the conduct of the party, and that presumption may be conclusive, even against the actual intention of the party, where his conduct has been such that it would be inequitable to others to permit him to assert that he had not ratified the unauthorized act of his agent.

Implied ratification, by mere silence or failure to expressly disavow, has its foundation in the doctrine of equitable estoppel, and proceeds upon the maxim of the law that he who remains silent when in conscience he ought to speak will be debarred from speaking when in conscience he ought to remain silent. Where the rights

and obligations of third parties may depend on his election to ratify or disaffirm, a party is bound to act, or suffer the consequences of inaction; and if, after knowledge, he remains entirely silent and impassive, it is but just, when the protection of third parties require it, to presume that what, upon knowledge, he has failed to repudiate, he has tacitly ratified. Mechem, Ag. §§ 155-157.

To render the evidence conclusive of implied ratification by silence or mere nonaction, the facts must be such that the law will presume that third parties would be prejudiced by the delay in speaking or acting, if the party should be thereafter permitted to say that he had not authorized or ratified the act of his assumed agent. This principle has not always been distinctly or expressly announced by the courts, but we think that it will be found that, in almost every well-considered case in which it has been held that there was an implied ratification by silent and merely passive acquiescence, the facts brought the case within the rule substantially as we have stated it.

In this case the facts strongly, if not conclusively, rebutted any such presumption; for it affirmatively appeared (1) that, before notice was communicated to the defendant, the Kelleys had already made a general assignment, by which all their assets had been impounded for the benefit of their creditors; and (2) that the time for proving claims against their estate had not yet expired, and did not for a long time thereafter. Under the evidence, the question of ratification, like that of original authorization, was, at most, a question of fact for the trial court.

3. It appeared that Aldrich, a banker in Vermont, acted as agent for numerous other parties in placing loans through the Kelleys; and there was evidence tending to show that his general instructions to the Kelleys applied to all these loans, defendant's included, although no special mention was made of the latter; and certain errors are assigned upon the alleged rulings of the court excluding evidence of these general instructions, and as to how these loans were handled by the Kelleys, with the knowledge of Aldrich.

But an examination of the record shows that the offered evidence as to the instructions of Aldrich regarding these loans, and as to whether, to his knowledge, the Kelleys were in the habit of collect-

ing them without having first received the securities for the purpose of collection, was all admitted. The only evidence which seems to have been excluded was as to whether the Kelleys had been in the habit of extending the time of payment of loans other than defendant's without special authority from Aldrich; and we cannot see that this was material, as this loan was extended by the defendant himself, and the vital question in this case was whether the Kelleys had authority to receive payment except where the securities had been first sent to them for that purpose.

4. One of the grounds on which the plaintiff moved for a new trial was "newly-discovered," or rather, "new" evidence of ratification by the defendant. From the affidavits and counter affidavits used on this motion, it appeared that on December 28, 1897 (over 13 months after this action had been tried and decided), C. H. Smith, already referred to, made up from the account books of the Kelleys a statement of account in favor of defendant against the Kelleys' estate, one of the items of which was the \$300 paid by plaintiffs to the Kelleys, and attached to this statement a form of an affidavit of proof to the effect that the Kelleys were indebted to the defendant in the full amount of the claim (over \$1,100) for money collected and not remitted, and then sent it by mail to the defendant, with request that he execute and return it. Upon its receipt, defendant made oath to it, and returned it to Smith, who filed it on January 8, 1898, in the insolvency proceedings, as proof of a claim against the Kelley estate.

It further appeared that this claim was withdrawn by the defendant, with leave of the court, on the 23d of the following month. The defendant also made affidavit that he did not intend to make any claim against the Kelley estate for the \$300, and was not aware that such was the legal effect of the proof; that he had no familiarity with legal proceedings; that he supposed the matter had received Smith's personal attention, and therefore assumed it was all right, without giving the matter any special consideration.

Upon this state of facts, the filing of the claim would be by no means conclusive or controlling on the question of ratification; and, under the circumstances, we certainly cannot say that the court abused its discretion in refusing to grant a new trial for the

purpose of giving the plaintiff an opportunity to introduce this item of new evidence.

The case is probably a "hard" one. It would appear from the record that a poor and aged couple, by reason of their ignorance of business, or their overconfidence in the integrity of others, are in danger of losing their little home, through the fraud and dishonesty of the Kelleys; but hard cases cannot be permitted to make bad law.

Order affirmed.

WILLIAM G. RICHARDS v. MINNESOTA SAVINGS BANK and Others.

January 6, 1899.

Nos. 11,350—(189).

Savings Bank—Laws 1867, c. 23—Laws 1875, c. 84.

Laws 1867, c. 23,—an act to provide for the incorporation of savings associations,—was superseded by Laws 1875, c. 84, except as to savings banks and associations previously organized. As to them, it remains in force.

Same—Abandonment of Business for 16 Years—No Dissolution of Corporation.

The Union Savings Bank of Rochester was a corporation duly organized under the act of 1867. In the year 1873 it sold all of its assets and the good will of its business, and paid its depositors. Thereafter it did no business for 16 years, but, in 1889, its board of trustees was reorganized by the co-operation of a majority of its then surviving trustees. The new board amended its articles of incorporation pursuant to the provisions of Laws 1889, c. 233, whereby the name of the corporation was changed to the Minnesota Savings Bank, and its place of business to St. Paul. Thereafter, and until February, 1897, the Minnesota Savings Bank did business at St. Paul as a bank, with the acquiescence of the state. *Held*, that such failure of the Union Savings Bank to exercise its corporate powers did not work a dissolution of the corporation, and that, if it be conceded that the act of 1889 is unconstitutional, still it gave the corporation color of law for the change of its name and place of business; therefore the Minnesota Savings Bank was and is at least a de facto corporation.

Corporation de Facto—Partnership—Fraud.

A creditor who has dealt with a corporation de facto in its corporate name and capacity, and given credit to it, and not to its members or stockholders, cannot, in the absence of fraud, charge them, as partners, with the debts of the corporation.

Finding of Court Sustained.

The finding of the trial court to the effect that the plaintiff and his assignors dealt with the Minnesota Savings Bank as a corporation is sustained by the evidence.

Action in the district court for Ramsey county to recover from defendant bank, and the individual shareholding defendants, the sum of \$7,517.47 deposited by plaintiff and other persons with the Minnesota Savings Bank. The cause was tried before Kelly, J., without a jury, who ordered judgment in favor of plaintiff against the defendant bank, but in favor of the individual defendants for costs. From the judgment entered in pursuance of such order, plaintiff appealed. Affirmed.

Alva R. Hunt, for appellant.

The Union Savings Bank of Rochester was dissolved in 1873. The voluntary surrender by a corporation of its franchise is one of the recognized modes by which its existence may be terminated. 5 Thompson, Corp. §§ 6678, 6681; 1 Morawetz, Corp. § 413; Lauman v. Lebanon, 6 Casey, 42; Black v. Delaware, 22 N. J. Eq. 130; Merchants v. Wagner, 71 Ala. 581; Pringle v. Eltringham, 49 La. An. 301. The absolute common-law right of a private corporation to dissolve itself is not abridged by the statute permitting a direct action to be brought in certain cases by the state to dissolve it. See Treadwell v. Salisbury, 7 Gray, 393; Angell & Ames, Corp. § 127; 2 Kent, Com. 280; Bradt v. Benedict, 17 N. Y. 93. If a corporation suffer acts to be done which destroy the end and object for which it was instituted, it is equivalent to a surrender of its rights. Briggs v. Penniman, 8 Cow. 387; Slee v. Bloom, 19 Johns. 456; 2 Kyd, Corp. 467; Strickland v. Prichard, 37 Vt. 324; Bartholomew v. Bentley, 1 Oh. St. 37. The consent of the state may not prevent a forfeiture of the corporate franchise, when the corporation disposes of and abandons its business and operating franchise,

so that there is nothing left which it can lawfully do and no reason for keeping it longer alive. *State v. St. Paul & S. C. R. Co.*, 35 Minn. 222; *Combs v. Milwaukee*, 89 Wis. 297. An abandonment or surrender by corporators of their franchise is a question both of fact and intent, and undoubtedly such an abandonment may be proved by acts as well as by words. 5 *Thompson, Corp.* §§ 6659, 6683.

The franchise of a corporation is merely a privilege, and, in the nature of things, cannot be transferred like tangible property. The transfer of a franchise in reality means a grant of a new franchise by the state to the transferee. An attempted transfer without the consent of the state is void. 1 *Morawetz, Corp.* §§ 422, 924, 928. See also *State v. Sherman*, 22 Oh. St. 411. The franchise of a corporation being an incorporeal hereditament, cannot be seized and sold under an execution. *Gue v. Tide W. C. Co.*, 24 How. 257; *Randolph v. Larned*, 27 N. J. Eq. 557; *Stewart v. Jones*, 40 Mo. 141.

Laws 1889, c. 233, is void as being in violation of the constitution prohibiting special legislation. See *City v. Gillett*, 32 Kan. 431; *Nichols v. Walter*, 37 Minn. 264; *State v. Sheriff*, 48 Minn. 236; *State v. Inhabitants*, 47 N. J. L. 442; *Green v. Knife Falls Boom Corp.*, 35 Minn. 155.

Any corporate right, privilege and franchise which may have been transferred from the original corporation of the Union Savings Bank, was abandoned, and the corporation dissolved the instant its name was changed. *Cincinnati v. Bate*, 96 Ky. 356; *Lauman v. Lebanon*, *supra*; 1 *Thompson, Corp.* § 288; *Sykes v. People*, 132 Ill. 32.

The plaintiff sues the defendants not as a corporation, but as individuals, and there is no occasion for the application of the rule of estoppel. It is everywhere held that, where persons undertake to do business for financial gain or profit as a corporation and do not become legally incorporated, they are individually liable for the debts of the assumed corporate body. *Johnson v. Corser*, 34 Minn. 355; *Hess v. Werts*, 4 S. & R. 356; *Bigelow v. Gregory*, 73 Ill. 197; *Kaiser v. Lawrence*, 56 Iowa, 104; *Abbott v. Omaha*, 4 Neb. 416; *Jessup v. Carnegie*, 44 N. Y. Super. Ct. 260; *Wells v. Gates*, 18 Barb. 554; *Martin v. Fewell*, 79 Mo. 401; *Frost v. Walker*, 60 Me.

468; *Coleman v. Coleman*, 78 Ind. 344; *Eaton v. Walker*, 76 Mich. 579; *Sheren v. Mendenhall*, 23 Minn. 92; *Roberts Mnfg. Co. v. Schlick*, 62 Minn. 332. The corporate existence of a company which is neither a de facto nor a de jure corporation may be questioned in a private action to which it is a party. *Martin v. Deetz*, 102 Cal. 55. See also *Owen v. Shepard*, 59 Fed. 746; 6 *Thompson, Corp.* §§ 7642, 4355; *Finnegan v. Noerenberg*, 52 Minn. 239.

Dickson & Donnelly, for respondent savings bank.

The test by which to determine whether a corporation is dissolved for all purposes is whether it has lost its capacity to sustain itself by a new election of officers. If the corporation has the power in itself to supply the deficiency in its body, its rights are not extinguished, but only dormant. 5 *Thompson, Corp.* § 6578.

The validity of a corporation cannot be questioned collaterally, but only in a direct proceeding by the state. 6 *Thompson, Corp.* § 7642. This is true also with de facto corporations. *Id.* §§ 7642, 7643; *Finnegan v. Noerenberg*, 52 Minn. 239; *Taylor, Priv. Corp.* 105; 1 *Cook, Stockh.* § 637.

A corporation is not to be deemed dissolved by reason of any nonuser or misuser of its franchises, until default has been judicially ascertained and declared. *Minn. Central Ry. Co. v. Melvin*, 21 Minn. 339; 1 *Cook, Stockh.* § 637; 6 *Thompson, Corp.* § 7722. A person dealing with a de facto corporation as such, and becoming its creditor, will not be allowed to set up the invalidity of its organization for the purpose of going beyond the artificial body and charging its stockholders as partners, in the absence of fraud. 6 *Thompson, Corp.* § 7648. See also *Johnson v. Corser*, 34 Minn. 355; *Merchants v. Stone*, 38 Mich. 779; *Stout v. Zulick*, 48 N. J. L. 599; *Rutherford v. Hill*, 22 Ore. 218; *People v. Montecito*, 97 Cal. 276.

Flandrau, Squires & Cutcheon, for respondent Sarah W. Coleman.

A de facto corporation exists where there is a law authorizing the creation of corporations, and an attempt to organize a corporation pursuant to it, and a user as a corporation under such attempted organization. *Finnegan v. Noerenberg*, 52 Minn. 239. A person contracting with a corporation is estopped to deny its legal

existence or its power to make the contract, unless the fact of the incorporation or power was stipulated for, or the making of the contract was prohibited by law, or the person was fraudulently induced to recognize the corporation or power. 7 Am. & Eng. Enc. 29; *Frick v. Trustees*, 99 Ill. 167; *Close v. Glenwood Cemetery*, 107 U. S. 466; *Hasselman v. U. S.*, 97 Ind. 365; *Marion v. Dunkin*, 54 Ala. 471; *Stoutimore v. Clark*, 70 Mo. 471; *Estey v. Runnels*, 55 Mich. 130; *Massey v. Citizens*, 22 Kan. 624. See also *French v. Donohue*, 29 Minn. 111; *Scheufler v. Grand Lodge A. O. U. W.*, 45 Minn. 256; *Minn. Gaslight E. Co. v. Denslow*, 46 Minn. 171; *Hause v. Mannheimer*, 67 Minn. 194; *Caldwell v. Auger*, 4 Minn. 156 (217); *Chaska Co. v. Board of Suprs.*, 6 Minn. 130 (204); *County Commrs. v. Robinson*, 16 Minn. 340 (381). A corporation's right to exist cannot be attacked collaterally. 6 *Thompson, Corp.* § 7642; *Finnegan v. Noerenberg*, *supra*.

J. P. Kyle, for respondent John Marty.

START, C. J.

This action was brought to impose a partnership liability on the alleged associates or stockholders interested in the Minnesota Savings Bank, one of the defendants herein, for deposits made in the bank by plaintiff and his assignors, on the ground that the bank was not a corporation. A trial of the action resulted in a judgment in favor of the plaintiff against the bank for the amount claimed, and in favor of the individual defendants against the plaintiff, that he take nothing by this action, and for costs against him. The plaintiff appealed from the judgment against him.

The facts found by the trial court, briefly stated, are these:

On March 31, 1873, the Union Savings Bank of Rochester was a *de jure* corporation, and a going savings bank, which was duly organized in 1868, under Laws 1867, c. 23, with J. V. Daniels, M. J. Daniels, Asahel Smith, J. B. Clark and Frederick T. Olds as incorporators and sole trustees thereof. J. V. and M. J. Daniels on or prior to the day named had acquired from the other trustees, and persons interested therein, all of the assets of the Union Savings Bank, and claimed to be the owners thereof, and of the charter, franchise and privileges of the bank. Immediately thereafter they

transferred all of the assets and good will of the Union Savings Bank, not including its charter, franchise and privilege to be a savings bank, to the Union National Bank of Rochester. Thereafter, and prior to 1889, the Union Savings Bank did not do any business whatever as a bank, except such as was necessary to close up its accounts with its customers. No meetings were held by the trustees during this time, and no attempt was made to transact any other business. In the year 1889, and some time prior to the month of June, M. J. Daniels, claiming to be the sole surviving trustee of the Union Savings Bank having any beneficial interest therein, in consideration of \$1,000 paid to him in good faith, sold and transferred to William Bickel and others, associated or to become associated with him, the charter, franchise and privilege to be a corporation of the Union Savings Bank, with the knowledge that Bickel and his associates intended under such charter to open and conduct a bank in the city of St. Paul. Prior to this time two of the trustees (J. V. Daniels and J. B. Clark) died, and one other (F. T. Olds) had moved from the state. After such transfer of the charter, and to make it effective, William Bickel, William F. Bickel and Frederick C. Stevens, with the co-operation and assent of M. J. Daniels and Smith, two of the then three surviving trustees, reorganized the board of trustees of the Union Savings Bank, and in good faith filled all vacancies in such board, which thereafter and at all times in good faith acted as and for the Union Savings Bank. On June 4, 1889, the board of trustees amended the articles of incorporation, and changed the name of the Union Savings Bank of Rochester to the Ramsey County Savings Bank, and its place of business to St. Paul; and thereafter, and on August 6, 1889, the board, by an amendment of the articles of incorporation, changed the name of the corporation to the Minnesota Savings Bank, and further provided that the capital stock thereof should be \$400,000, divided into 8,000 shares of \$50 each. Thereafter, and until the month of February, 1897, the Minnesota Savings Bank continuously did business at the city of St. Paul as a bank, and claimed the legal right to so operate and do business under the charter of the Union Savings Bank, and was in fact a bank; and during all this time the state of Minnesota, by its bank examiner,

received from it the reports required by law of the banks of the state, and treated it as a lawfully existing and going bank of the state. In 1889, and about the time the Minnesota Savings Bank began business in St. Paul, an application was made by interested parties to the attorney general of the state to institute proceedings in the name of the state to test the legality of the claim of the Minnesota Savings Bank to do business under the charter of the Union Savings Bank, which application, after a hearing and investigation, was denied. The plaintiff and his assignors dealt with the Minnesota Savings Bank, in depositing the money with it, for the recovery of which this action was brought, as a corporation doing a banking business. Each of the individual defendants at the time such deposits were made was financially interested in the bank, and each then held a certificate for one or more shares of its supposed capital stock.

A brief reference to the statutes relating to savings banks, in connection with this statement of facts, is essential to a clear understanding of the propositions here urged by the plaintiff. Laws 1867, c. 23, entitled "An act to provide for the incorporation of savings associations," provided that any number of persons not less than five might be incorporated as a savings association, by complying with its terms. Upon doing so, they and their successors became a corporation and body politic, with perpetual succession. The incorporators and their successors were the board of trustees to whom the management of the business of the corporation was exclusively committed, with power to fill all vacancies in the board of trustees by a majority vote of the surviving trustees.

By Laws 1875, c. 84, Laws 1867, c. 23, was amended "so as to read as follows." The latter act was re-enacted and amended by the former. There were at this time some six savings banks in the state, which were organized under the act of 1867, of which the Union Savings Bank of Rochester was one. Section 18 of the act of 1875 provided that,

"Any savings association which has been heretofore incorporated and is now doing business as a savings association or bank, may

avail itself of the privileges of this act and shall be subject to all of the liabilities prescribed therein."

Shortly thereafter, and on June 18, 1875, it was held by the attorney general of the state that savings banks organized under the act of 1867 might continue to do business without complying with the act of 1875. Op. Attys. Gen. (1858-1884) 323. Afterwards, and on February 11, 1880, it was held by the same officer, in an opinion for the guidance of the public examiner, that the act of 1875 superseded the act of 1867 as to all savings banks incorporated subsequently to the act of 1875, but as to those previously organized the act of 1867 remained in force, unless they elected to reorganize under the act of 1875. Id. 414.

Laws 1879, c. 109, codified the law as to savings banks, but it expressly provided that no part of the act should apply to savings banks then in existence and operation. Section 1 of this act declared savings banks or institutions for savings then existing, or which might be thereafter organized, to be corporations, and section 48 thereof provided for the change of the name of a corporation with the approval of the public examiner. The evidence in this case shows that no application was made to that officer for permission to change the name of the Union Savings Bank under this act.

Laws 1889, c. 233, purports to amend Laws 1867, c. 23, § 11, so as to authorize the board of trustees of any savings bank organized under the act of 1867 to change its name and place of business by an amendment of its articles of incorporation.

The claim of the plaintiff, stated concisely, is that the Minnesota Savings Bank was never a corporation, *de jure* or *de facto*; hence the defendant stockholders are individually liable to the depositors in the bank and its other creditors as partners.

It is urged in support of the proposition that the Union Savings Bank was dissolved in 1873 by reason of an abandonment at that time of its corporate rights and franchise, and that it never after existed as a corporation. It is to be noted in this connection that this corporation was not one for conducting a purely private enterprise for the benefit of its members, its trustees. Its corporate

franchise was granted to it to conserve important public interests, by affording persons of small means an opportunity for the safe investment of their savings, and thereby foster habits of industry and thrift. The duty and the trust of receiving all deposits, and safely investing them for the benefit of the depositors, were imposed upon the trustees of this corporation in consideration of its corporate franchise. The corporation was not required to have any capital stock or property whatever before commencing business, for its duty and business was to receive and invest the money of others. See Laws 1867, c. 23.

Hence the Union Savings Bank did not, by paying its depositors, and transferring its assets and business to the Union National Bank, destroy the end and object for which it was organized, and thereby incapacitate itself from discharging in the future its corporate powers and duties. It could thereafter resume the business of receiving deposits and investing them, precisely as it began in the first instance to do. The nonuser of the corporate franchise for 16 years did not work a dissolution of the corporation.

Its continued neglect to discharge its duty to the public by the exercise of its corporate franchise was a good reason why the state should have resumed the grant and dissolved the corporation, but, in the absence of any action on the part of the state, a surrender or abandonment of its corporate franchise, and an acceptance thereof by the state, cannot be presumed from its transfer of its property and continued nonuser of its franchise. It remained an inactive corporation, and had the right to resume the exercise of its franchise in 1889, unless the state interfered. The Union Savings Bank was therefore a *de jure* corporation in 1889, when its board of trustees was reorganized.

In reaching this conclusion, we have not overlooked the cases cited and relied on by the plaintiff, which hold, in effect, that a corporation for pecuniary profit becomes extinct for all purposes whenever there has been an abandonment of its franchise, committed under such circumstances, or continued for such length of time, as to render it legally impossible for it to renew them. Such, as already stated, was not the case with the Union Savings Bank. It did not abandon its franchise, but simply ceased to exercise it

for a time. It did not do any act which incapacitated it, or rendered it legally impossible, to resume business.

It is further urged by plaintiff that the alleged sale and transfer of the corporate franchise in 1889 to Bickel and associates was void. It is true that nothing passed by the transfer. *Dickson v. Kittson*, *supra*, page 168.

But this did not affect the existence of the corporation. A void act could not dissolve it. Its board of trustees was reorganized, and the vacancy therein filled, by the co-operation and consent of a majority of the surviving trustees. It then became an active corporation, and might have resumed business at Rochester. It, however, changed its name and place of business by an amendment of its articles of incorporation. The plaintiff claims that this change of name was not authorized by law; hence the franchise was abandoned and the corporation dissolved the instant its name was changed. If the attempted change in the name of the corporation and its place of business was void, because unauthorized, it could not affect the existence of the corporation; but it would affect its strictly legal right to exercise its corporate privileges, by the name of the Minnesota Savings Bank, at St. Paul.

The reasons urged why the amendment of the articles of incorporation was unauthorized are that Laws 1889, c. 233, by virtue of which the amendment was made, is void, because Laws 1867, c. 23, § 11, which it attempted to amend, had then been displaced by Laws 1875, c. 84. The act of 1867 remained in force as a general law after the act of 1875 as to all savings banks theretofore organized.

Whether the act of 1889 is unconstitutional because it, in effect, grants special privileges to a particular class of savings banks, as claimed by plaintiff, and is, in effect, special legislation, is a more serious question. It is certainly restricted in its application to that class of savings banks which was in existence prior to the act of 1875, and the class cannot now be enlarged. However, it is not necessary to decide the question here; for, if the act be unconstitutional, it gave the Union Savings Bank color of law for its acts in changing its name and place of business, and it thereafter, in good faith, with the implied, if not the direct, consent of the

state, exercised its corporate powers as the Minnesota Savings Bank. It was, therefore, a de facto, if not a de jure, corporation. *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400.

The trial court found as a fact that the plaintiff and his assignors dealt with the Minnesota Savings Bank as a corporation doing a banking business at the time they severally deposited their money in the bank. The plaintiff claims that this finding is not sustained by the evidence. Neither the plaintiff nor any of his assignors were witnesses on the trial; hence they made no claim that they dealt with the defendant stockholders, or knew of their existence, nor did they deny that they knew that the Minnesota Savings Bank was doing business as a corporation, and dealt with it as such. These were matters peculiarly within their own knowledge, and only slight evidence was necessary to justify the finding. The very name of the association (Minnesota Savings Bank) advised persons dealing with it that it claimed to be an incorporated savings bank; for the statute forbids any bank or banker, except such savings banks, to advertise or put forth a sign as a savings bank, or to solicit or receive deposits as such. Laws 1879, c. 109, § 46. The evidence in connection with the plaintiff's allegations in his verified complaint sustains the finding.

The case at bar, then, in its last analysis, is simply this: The Minnesota Savings Bank, a de facto corporation, in good faith assumes and exercises all of the functions and powers of a de jure corporation, with the acquiescence of the state; and the plaintiff contracts with it as such, on the faith of its corporate responsibility, and not otherwise. The contract is legally enforceable by him against the bank. But the bank becomes insolvent, and then the plaintiff seeks to repudiate his contract with it, and to charge innocent stockholders, who did not have, and were not permitted by law to have, any control of the affairs of the bank, as partners, with the entire liabilities of the bank. Whatever may be the rule in other jurisdictions, happily the laws of this state sanction no such injustice.

It is the settled law of this state that a creditor who has dealt with a corporation de facto in its corporate name and capacity,

and given credit to it, and not to its members or stockholders, cannot, in the absence of fraud, charge them, as partners, with the debts of the corporation. *Finnegan v. Noerenberg*, 52 Minn. 239, 53 N. W. 1150; *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147. This case falls within the rule.

Judgment affirmed.

CANTY, J.

I concur in all of the foregoing opinion, except that part which holds that the charter of the Union Savings Bank was not abandoned, and the franchise lost, by the 16-years nonuser. But it is not necessary to decide in this case whether the charter was lost or not. Conceding that the franchise of the bank was lost by said nonuser, I am of the opinion that the Minnesota Savings Bank should still be treated in this case as a corporation de facto.

HORACE C. LYMAN v. GAAR, SCOTT & COMPANY.

January 6, 1899.

Nos. 11,374—(244).

Attachment—Unrecorded Deed—Coles v. Berryhill Followed.

Held, following *Coles v. Berryhill*, 37 Minn. 56, that an unrecorded conveyance is void, as against an attachment or judgment, only when they are against the person in whose name the title to the land appears of record in the office of the register of deeds of the county in which the land is situated.

Adverse Claims—Finding of Court Sustained—Evidence.

The finding and decision herein of the trial court to the effect that the plaintiff is the owner of the land in question, and that the defendant has no interest in, or lien on, it, are sustained by the evidence, and the trial court did not err in admitting the evidence.

From a judgment of the district court for Big Stone county in favor of plaintiff, entered pursuant to the findings and order of C. L. Brown, J., defendant corporation appealed. Affirmed.

John M. Rees, for appellant.

E. F. Crawford, for respondent.

START, C. J.

Action under the statute to determine adverse claims to real estate. The trial court found that the plaintiff was the owner in fee simple of the land described in the complaint, and that the defendant had no title to, interest in, or lien upon, it, and that judgment be so entered. The defendant appealed from the judgment.

The only claim asserted by the defendant to the land by its answer was that on January 10, 1895, it levied upon all the right, title and interest of Henry A. Buzzell in the land, by virtue of a writ of attachment issued in an action then pending wherein it was plaintiff and he was defendant; that at the time of such levy the land belonged to Buzzell, although the legal title thereto was not in his name. The answer also alleged that a judgment was thereafter, and on July 12, 1895, entered in such action in its favor, and against Buzzell, for \$752.45, which has not been paid.

The reply admitted that the attachment was issued as alleged, and that on January 10, 1895, a copy thereof, purporting to levy upon all of the interest of Buzzell in the land, was filed in the office of the register of deeds of the proper county; also the recovery of the judgment, and that it had not been paid; but it alleged that Buzzell had no interest in the land when the attachment was issued.

The evidence on the trial tended to show that on November 1, 1894, the Henry A. Buzzell mentioned in the answer held a contract for the purchase of the land in question from the St. Paul & Chicago Railway Company, upon which he had made partial payments; that on or about the day named he sold and assigned his contract to the plaintiff; and, further, that thereafter the plaintiff surrendered the contract and the assignment thereof to the railway company, paid to it the balance of the purchase price of the land according to the terms of the contract, and thereupon the railway company made and delivered to him its warranty deed of the land, in which its trustee, the Farmers' Loan & Trust Company, joined.

There was neither evidence nor claim on the trial that Buzzell ever had any other interest in the land except such as he acquired by his contract from the railway company, and there was neither

evidence nor claim that the contract, or the assignment thereof, had ever been recorded.

The defendant assigns as error the admission of the evidence tending to establish the foregoing facts, especially the admission of parol evidence of the contract and its assignment, which were in writing. Sufficient proof was made of the then nonexistence of the writings to justify the admission of the secondary evidence. It is also urged that the admission of the deed from the railway company to the plaintiff was error.

The deed was properly executed and acknowledged, and was competent and material evidence, in connection with the other evidence in the case, to which reference has already been made. It is true, as defendant claims, that there was no evidence, other than as we have stated, that the railway company ever owned the land; but the defendant alleged in its answer that Buzzell was the owner of the land, although he did not hold the legal title, and claims only through him.

The plaintiff having established *prima facie*, at least, that the only interest Buzzell ever had in the land was by virtue of his contract for the purchase of it from the railway company, and that all of his interest passed by the assignment to the plaintiff, it was competent to show that the latter had complied with the contract and received a deed of the land. This was sufficient proof to compel the defendant to show that it had some other and better right to the land.

The defendant, however, claims that the unrecorded assignment of Buzzell's contract was void as against its attachment and judgment by virtue of our registry law (G. S. 1894, § 4180), which, so far as here material, is in these words:

"Every conveyance by deed * * * or otherwise * * * shall be recorded in the office of the register of deeds of the county where such real estate is situated; and every such conveyance not so recorded shall be void * * * as against any attachment levied thereon, or any judgment lawfully obtained, at the suit of any party, against the person in whose name the title to such land appears of record."

Independent of this statute, the rights of attachment and judg-

ment creditors are precisely as they were at common law; that is, the lien of the levy or judgment attaches only to the actual interest the debtor had in the land at the time of the levy or docketing of the judgment.

And where, as in this case, the creditor seeks to subject the property of a third party to the payment of his debt against a prior owner thereof, he must bring himself within the statute. The defendant has not done so in this case. The meaning of this statute is not doubtful. It places attaching and judgment creditors on a footing with bona fide purchasers as against an unrecorded conveyance, only where the attachment or judgment is against the person in whose name the title to the land appears of record; that is, it allows their liens to attach to the lands of their debtors according to the title as it appears of record prior to the recording of such conveyance, and not as it exists in fact. *Dickinson v. Kinney*, 5 Minn. 332 (409); *Coles v. Berryhill*, 37 Minn. 56, 33 N. W. 213; *School Dist. v. Peterson*, 74 Minn. 122, 76 N. W. 1126.

In this case Buzzell never had any title of record to the land; hence the unrecorded assignment of his contract for its purchase was not void as against the defendant's attachment and judgment, and the defendant acquired no lien on, or interest in, the land by its attachment and judgment. It stood simply in Buzzell's shoes, and, as he then had no interest in the land, the defendant obtained none.

The finding and decision of the trial court, to the effect that the defendant has no interest in, or lien on, the land, but that the plaintiff is the owner thereof, are sustained by the evidence.

Judgment affirmed.

FREDERICK J. ROMER v. ST. PAUL CITY RAILWAY COMPANY.

January 6, 1899.

Nos. 11,400—(202).

Street Railway—Car Barn in Residence District—Nuisance.

The defendant has for some years maintained and operated by public authority a street-car system, the motive power of which is electricity, in the city of St. Paul. As a necessary incident to such operation, it has maintained a car barn in a residence district, for the purpose of storing a part of its cars when not in use on the streets. The barn fronts on Ramsey street, with its sides abutting on Thompson and Smith avenues, respectively. It is not authorized to operate its system on these avenues, but it has, without any negligence in the premises, laid tracks and curves thereon, over which it runs its cars to and from the barn, from early in the morning until late at night. Such operation of its cars over such tracks and curves causes loud and disagreeable noises, whereby the rest and comfort of the plaintiff are disturbed, and the rental value of his real estate abutting on the street and avenues is materially reduced.

1. *Held*, construing the city ordinances granting to the defendant the right to operate its street-car system, that it is authorized so to lay and operate the tracks and curves on the avenues.

2. *Held*, further, upon the undisputed evidence, that the location of the barn is not an improper or unreasonable one, and that the acts of the defendant do not constitute a private nuisance for which the plaintiff can recover damages.

Action for \$6,000 as damages done to plaintiff's property by defendant in operating its street-car barn and switches. A verdict was rendered for defendant. From an order of the district court for Ramsey county, Bunn, J., denying a motion for a new trial, plaintiff appealed. Affirmed.

O. E. Holman, for appellant.

The evidence in this case proved the existence of a nuisance within the meaning of G. S. 1894, § 5881. See also *Wood*, Nuis. (2d Ed.) §§ 612, 617.

That is a nuisance which annoys and disturbs one in the possession of his property, rendering its ordinary use or occupation phys-

ically uncomfortable to him. For such annoyance and discomfort the courts of law will afford redress by giving damages against the wrong-doer. *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317; *Bohan v. Port*, 122 N. Y. 18; *Cogswell v. New York*, 103 N. Y. 10; *Mahady v. Bushwick*, 91 N. Y. 148.

Where one maintains a nuisance upon his lands, which renders the premises of his neighbor disagreeable and uncomfortable, the proper measure of damages is the difference in the rental value, free from the effects of the nuisance and subject to it. *Francis v. Schoellkopf*, 53 N. Y. 152; *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 41, 31 Minn. 45.

A nuisance may be at the same time both public and private. It is not the number who suffer, but the nature of the right affected which determines whether an action will lie. Those who live in the neighborhood, or who own property there, which is impaired in value by reason of the nuisance, may have their private actions since their damage is special. *Aldrich v. Wetmore*, 52 Minn. 164. The case at bar is to be distinguished from *Adams v. Chicago, B. & N. Ry. Co.*, 39 Minn. 286, and *Gundlach v. Hamm*, 62 Minn. 42, where the alleged nuisance occurred while the cars and locomotives were engaged in the ordinary and usual business of transportation; while with the present case, the nuisance arises while the company is running its cars into or out of a round house—a purely private convenience. See *Cogswell v. New York*, *supra*; *Bohan v. Port*, *supra*; *Carli v. Stillwater Street Ry. & T. Co.*, 28 Minn. 373; *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112. A street cannot be converted into a yard for the storage or deposit of cars to the injury of adjoining owners. *Mahady v. Bushwick*, *supra*.

Plaintiff claims that the defendant has no right nor authority whatever to operate any electric lines, tracks, curves or switches either upon Smith or Thompson avenues; that it is a trespasser on these streets, and that all the acts performed by it on them constitute a nuisance per se. None of the ordinances relied upon by defendant, towit, Ordinances Nos. 57, 1502 and 1227, confer upon it the right to do these acts which constitute a nuisance to plaintiff. See 23 Am. & Eng. Enc. (1st Ed.) 958, 960; *Fanning v. Osborne*, 102 N. Y. 441. Grants of a franchise are to be strictly construed

against the grantees. *Fertilizing Co. v. Hyde Park*, 97 U. S. 659; *Com. v. Erie*, 27 Pa. St. 339; *Borough v. Stamford*, 56 Conn. 381; *City v. Concord*, 65 N. H. 30; *Burns v. Multnomah Ry. Co.*, 15 Fed. 177; *State v. City*, 58 N. J. L. 565. It is often correctly said that which the law authorizes cannot be a nuisance, but this has reference only to indictments or public prosecutions to abate the nuisance. It has not and cannot have reference to the property rights of individuals. *Kabbe v. Village*, 20 Misc. 477; *Matthews v. Stillwater Gas & E. L. Co.*, 63 Minn. 493; *Campbell v. Seamans*, 63 N. Y. 568. As the statute gives the right to recover damages generally, any kind of damages resulting from the nuisance, whether direct or consequential, may properly be recovered in the action. *Colstrum v. Minneapolis & St. L. Ry. Co.*, 33 Minn. 516.

Munn & Thygeson, for respondent.

The grant of the right to construct a railway carries with it as an incident the right to construct such turnouts and switches as may be necessary for the successful operation of the road. *Mayor v. Houston*, 84 Tex. 581.

As construed by this court, defendant has a right, under Ordinance No. 57, to construct and maintain its tracks upon those portions of Thompson and Smith avenues now occupied by it. *Nash v. Lowry*, 37 Minn. 261. Furthermore, the long-continued usage has raised a presumption of defendant's right, which casts the burden upon plaintiff to prove the contrary. *Carson v. Central*, 35 Cal. 325, 332.

The use of a street for street-railway purposes does not impose an additional burden upon the street for which the owner of the fee is entitled to recover. *Carli v. Stillwater Street Ry. & T. Co.*, 28 Minn. 373; *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112.

Before plaintiff can recover he must show special or peculiar damage to himself. See *Gundlach v. Hamm*, 62 Minn. 42. Assuming plaintiff has sustained recoverable damage the proof leaves the amount so much in doubt that only nominal damages can be awarded. See *Hubbard Spec. Mnfg. Co. v. Minneapolis Wood D. Co.*, 47 Minn. 393; *Palmer v. Degan*, 58 Minn. 505; *Nickerson v.*

Wells-Stone Mer. Co., 71 Minn. 230; Adams v. Chicago, B. & N. R. Co., 39 Minn. 286.

START, C. J.

This was an action for damages against the defendant for so maintaining and operating its street-car barn, and switching the cars in and out of it, as to constitute a nuisance, whereby the rental value of the plaintiff's real estate was impaired. At the close of the evidence the trial court directed a verdict for the defendant, and the plaintiff appealed from an order denying his motion for a new trial.

Competent evidence was introduced on the trial which was sufficient, taking the most favorable view of it for the plaintiff, to establish the following facts: Ramsey street and Smith and Thompson avenues are public streets within the city of St. Paul. The plaintiff has owned for some years, and still owns, the real estate described in the complaint, abutting upon the street and avenues named, which is occupied by dwelling houses and flats, as stated in the complaint.

The defendant is a corporation for the purpose of operating street-railway lines in the city of St. Paul, and has been so engaged since 1872, and for the past nine years it has been engaged in operating a general system of electric street railways in the city, composed of various lines; but each line is practically a part of every other line, so that a passenger boarding the car on any particular line can, by means of a transfer, required by ordinance, on payment of one fare, ride to any point on any other line embraced within the system. One of the lines of this system is operated along Ramsey street, and is known as the "Grand Avenue Line," which connects with or crosses all the other lines of the system.

The defendant is the owner of the land bounded by Ramsey street and Thompson and Smith avenues, upon which is located the car barn in question, which fronts on Ramsey street. It has been the owner of this land, and has maintained a car barn thereon, and operated its cars in and out of it, for many years. Since 1890 electricity has been the motive power used on the defendant's lines, and since that date it has operated on Ramsey street its Grand avenue

line in front of the plaintiff's property, at which point it has used a cross switch.

At the intersection of Ramsey street and Thompson avenue it has maintained and used two curves; at Smith and Ramsey, two other curves; on Thompson avenue, one curve; and on Smith avenue, five curves. It has maintained single spur tracks on Thompson and Smith avenues, extending a short distance beyond the barn, to facilitate the getting of its cars in and out of the barn. For about six years before the commencement of the action these curves and tracks were used for the purpose of switching electric cars and motors into and out of the barn. The barn floor is covered with tracks, on which the defendant has stored, on an average, 60 to 70 cars.

The location of the barn is practically a residence district, but it is within a few blocks of the business part of the city, with a lumber yard and several shops and stores in its immediate vicinity. The defendant's employees begin about four o'clock in the morning to take the cars out of the barn with the switching motor, and put them in position on the streets around the barn for distribution over the system. The cars are brought back in the evening, and are taken into the barn up to one o'clock in the morning.

In switching and distributing the cars a great noise is made, which is heard every morning from four to six o'clock, and again in the evening to one o'clock in the morning. The cars are taken out of the barn on Thompson avenue, and around the curves to Ramsey street, and run over the switches in front of the plaintiff's brick block. In running around the curves, the cars produce a sharp, grinding noise, and in making up the trains and pulling them out there is a bumping noise.

The alleged nuisance consisted of the loud and disagreeable noises caused by the defendant so switching its cars in and out of the barn, and running them over and across the curves on Thompson and Smith avenues, and over the switch in front of the plaintiff's block on Ramsey street; also, by the ringing of the gongs on the cars, the loud talking of the defendant's employees in charge of them, and the hammering in cleaning and repairing the cars in the street. The noises so produced were such as to disturb the rest and

comfort of the plaintiff, his tenants and other property owners in the vicinity of the car barn, by keeping them awake until late at night, and rousing them in the early hours of the morning. And, further, in the obstruction of the streets in front of plaintiff's property by permitting its cars to stand thereon, and by bringing coal, wood, sand and other material to be used in the operation of its electric lines, and unloading them upon the street at or near the barn. The rental value of the plaintiff's property has been in some measure reduced by the alleged nuisance.

It was substantially admitted by the plaintiff on the argument of this appeal that the defendant was not guilty of any negligence in the construction, maintenance and operation of its street-railway tracks, curves, switches, cars and barn at the point in question. It was also conceded on the trial that no negligence in the premises had been proven. As to the repairs of the cars in the street, the evidence shows that they were such as were occasionally necessary to put the cars in a condition to be moved. The obstruction of the streets by the cars was temporary. In short, there is no evidence tending to show that the temporary obstruction of the street by the cars, or the repairing of them therein, or the unloading of the material on the street, resulted in any special injury to the plaintiff, different from that sustained by the general public. *Brakken v. Minneapolis & St. L. Ry. Co.*, 29 Minn. 41, 11 N. W. 124.

The real question, then, in this case, is whether the loud and disagreeable noises necessarily occasioned by the defendant in running its cars over its switches and curves in the streets, late at night and early in the morning, whereby the plaintiff is disturbed in the enjoyment of his property, is an actionable nuisance. The plaintiff, while conceding that the defendant has a right to maintain its car barn at the intersection of these streets, and to construct side tracks and switches on Ramsey street, claims it has no such right on Smith and Thompson avenues, and no legal right to switch its cars in and out of its barn over the tracks and curves upon the avenues.

In 1872 the city of St. Paul, by Ordinance No. 57, granted to the defendant the right to construct, maintain and operate, with animal power only, street-railway lines over and along certain of the streets of the city, including the streets here in question. The

defendant under this ordinance laid its tracks on Ramsey street, and also on Thompson and Smith avenues, adjacent to its barn at that point, and has ever since maintained them there.

In 1889 the city, by Ordinance No. 1227, granted to the defendant the right, and it was authorized, to construct, maintain and operate its street-railway system by cable, electric, pneumatic, or gas, power, at its option, in, over and along certain designated streets of the city, with all necessary side tracks, switches, poles, wires, conduits and appliances. Ramsey street was among those so designated, but neither Thompson nor Smith avenue was mentioned in the ordinance.

In 1891 the city, by Ordinance No. 1502, granted to the defendant authority so to construct and maintain poles, needful wires and apparatus, as to make connections with any of its electric power houses and stations, for the purpose of more fully perfecting its system upon certain streets and avenues therein named, and upon any streets on which the defendant then or thereafter might have its street-railway tracks.

We find in these ordinances no express grant to the defendant to maintain the curves and switches in the avenues in question for the purpose of taking its cars in and out of its barn, but the right to do so was given by necessary implication.

It is true that all public grants, unlike private ones, are construed strictly, and favorably for the grantor, the public. But it is equally true that where a grant is made for the benefit of the grantee, and also for the express accommodation and benefit of the public, everything which is reasonably proper and necessary (not simply convenient) to effect the essential objects of the grant passes by necessary implication. Otherwise the purpose of the grant would be seriously impaired, if not wholly defeated.

It is practically impossible for the defendant to operate its street-railway system without car barns in which to place its cars when not in use, for it would be intolerable to permit them to stand upon the streets. The only practical way to get the cars in and out of its barns is by the use of the usual motive power, and the use of tracks and curves on the streets adjacent to the barns. It would be a very narrow and technical construction of these ordinances to hold that

the defendant was authorized to lay switches and curves for the purpose of getting its cars in and out of its barns only on the streets upon which it was expressly authorized to operate its street-railway system.

Where, as in this case, its barn fronts on a street upon which it is authorized to and does operate its street-railway system, and it is reasonably necessary to take its cars in and out of the barn from the streets on each side of the barn, it has the right to do so, by virtue of the ordinances, although it has no right to operate its electric lines thereon. Booth, St. Ry. § 95.

This conclusion, however, does not dispose of this appeal; for while it is true, as a general proposition, that what is authorized to be done by law cannot be a public nuisance, yet it may be a private nuisance as to individuals who are specially injured thereby. 2 Wood, Nuis. § 557.

The question still remains whether the loud and disagreeable noises occasioned by the running of the defendant's cars in and out of its barn over the curves and switches on the streets at the place and at the hours in question, although authorized by the city ordinances, constitute an actionable nuisance as to the plaintiff.

The answer to this question—there being no negligence in the case—depends on whether the location of the defendant's car barn was a reasonable and proper one, and whether the use of the streets at the times and in the manner they were used by the defendant in running its cars over the curves and switches, whereby the noises complained of were produced, was one of the reasonable uses or purposes for which the streets were acquired.

The plaintiff cites and relies on a class of cases to the effect that, where a party is carrying on a lawful business on his own land without negligence, yet if it is a business which is attended with loud and disagreeable noises, or produces noisome smells or noxious vapors, whereby the property and comfort of those dwelling in the neighborhood are materially injured and disturbed, the business is a nuisance per se. Such cases, however, are not particularly in point; for this is not the case of carrying on an offensive trade or business on one's own premises which may be carried on at places removed from the occupied parts of a city, or beyond its limits.

The case of *Baltimore & P. R. Co. v. Fifth Baptist Church*, 108 U. S. 317, 2 Sup. Ct. 719, also relied on by the plaintiff, is more nearly in point than any other cited. But that case is clearly distinguishable from the one at bar. It was a case where a commercial railway company, whose motive power was steam, located its engine house and machine shop immediately adjoining a then existing church edifice, which was, and had been for some years prior to such location, continuously used by the church as its house of worship. The hammering in the shop, the passing of the engines in and out of the roundhouse, the blowing of whistles, the sounding of the bells and the cinders and offensive odors, created a constant disturbance of the religious exercises of the church. Such acts were held to constitute an actionable nuisance, and it was held that the church was entitled to damages in the premises. This was clearly a case of an improper and unreasonable location of its roundhouse and machine shop by the railway company, with reference to which the court, in its opinion, at page 334, said,

"There are many places in the city sufficiently distant from the church to avoid all cause of complaint, and yet sufficiently near the station of the company to answer its purposes."

But there is a radical difference between an ordinary commercial railway, operated by steam, and a surface street railway, operated by electricity, as to the selection of its roundhouses and machine shops by the one, and its car barns by the other. In each case the selection must be made with reference to the rights of property owners in the neighborhood; also, those of the railway company and of the public. The rights and convenience of property owners cannot alone be considered, for one living in a city must necessarily submit to the annoyances which are incidental to urban life, and individual comfort must in many cases yield to the public good.

Now, the only ground for claiming in this case that the location of the defendant's car barn was an improper one is that it is in the residence portion of the city. But the exclusive business of the defendant is the carrying of passengers within the limits of the city and in its streets. Its lines traverse the streets of the residence portion of the city. Its business is there. It takes on and dis-

charges passengers in all parts of the city. It must have its car barns so located that it can promptly get its cars upon its lines for the purpose of enabling the people of the city to seasonably get from their homes to their respective places of business or labor. It cannot locate its barns outside of the city, because it is only authorized to build and operate its lines within the city limits and upon its streets; and, if it had the authority to do otherwise, it would be impracticable and detrimental to public interests to do so.

Again, if it locates its barns at points where there are at present no dwelling houses, it is only a matter of time when some property owner will be disturbed by the loud and disagreeable noises necessarily occasioned by taking its cars in and out of the barns. The rights of such an owner are the same as those of the plaintiff. The barn in question is only one of five barns located and used by the defendant for the same purpose in different parts of the city, and the evidence conclusively shows that its location is not an improper or unreasonable one.

The further question, whether the maintenance and use by the defendant of the switches and curves in question are a proper street use, is settled adversely to the plaintiff by the previous decisions of this court. Such maintenance and use are a necessary incident to the operation of its street-car system, which derives its business from the streets, is intended for the convenience of the travel therein, and is in aid of the identical use for which the streets were acquired; hence the maintenance and operation of these switches and curves are a proper street use, and not an additional burden thereon. *Newell v. Minneapolis, L. & M. Ry. Co.*, 35 Minn. 112, 27 N. W. 839.

The discomfort and injury sustained by the plaintiff from the loud and disagreeable noises produced by taking the cars of the defendant in and out of its barn over the switches and curves at the place and at the times in question are the same, except in a greater degree, as are sustained by property owners at the street corners where its cars are operated over curves. The acts of the defendant complained of do not constitute a private nuisance for which the plaintiff is entitled to recover damages.

Order affirmed.

ANN E. MOREY v. CITY OF DULUTH.

January 6, 1899.

Nos. 11,440—(93).

City of Duluth—Lien of Assessment for Local Improvement—Sp. Laws 1887, c. 2, subc. 5, Construed.

The charter of the city of Duluth, relating to assessments for local improvements (Sp. Laws 1887, c. 2, subc. 5), construed, and *held*, that the lien of the assessment on the land benefited by the improvement is paramount to all other interests therein, including prior mortgage or other liens thereon; and, further, that mortgagees are included in the terms "persons interested" and "owner," as used in the charter, and may appear and oppose the confirmation of the assessment and the entry of judgment therefor, and that, if they fail so to do, they are concluded thereby.

Same—Lien of Prior Mortgage—Res Judicata.

The city acquired by deed from the fee owners a strip of land upon which the plaintiff had a mortgage, took possession of it, opened and improved it as a public street, and assessed the cost thereof on the abutting property, without first extinguishing the plaintiff's lien. *Held* that, if the assessment was prematurely made, it was a defense which the property owners might have urged in resisting confirmation of the assessment and the entry of judgment, but it does not affect the validity of the judgment.

From an order of the district court for St. Louis county, Cant, J., denying a motion for a new trial, plaintiff appealed. **Affirmed.**

A. A. Harris and *Henry E. Harris*, for appellant.

Mortgagees are not "owners" as that term is used in the charter of the city of Duluth. *St. Paul & S. C. R. Co. v. Matthews*, 16 Minn. 303 (341); *Parish v. Gilmanton*, 11 N. H. 293; *Crane v. City*, 36 N. J. Eq. 339. The existence, force and extent of assessment liens depend upon the statute creating them. *Gause v. Bullard*, 16 La. An. 107; *City v. Greble*, 38 Pa. St. 339; *Allegheny City's Appeal*, 41 Pa. St. 60; *Cook v. State*, 101 Ind. 446; *State v. Ætna*, 117 Ind. 251. The city had no title to this street as against plaintiff. *Morey v. City of Duluth*, 69 Minn. 5. And it could not acquire title except through a deed, or by condemnation proceedings, and the payment

or tender of just compensation. *Mayor v. Hook*, 62 Md. 371; 2 Beach, Pub. Corp. § 1115.

A mortgagee of lands is not an "owner" thereof. *Parish v. Gilman*, supra; *Mayor v. Boyd*, 64 Md. 10; *Wright v. Bennett*, 4 Ill. 258. Assessment statutes are to be strictly construed against a city. *Elliott, Roads & S.* 370; *Nopson v. Horton*, 20 Minn. 239 (268); *City v. Murphy*, 79 Ga. 101. The city could not lawfully assess abutting property, without first having acquired title to the street. *Detroit v. Detroit*, 76 Mich. 421.

J. B. Richards, for respondent.

All the questions raised on this appeal could have been urged in resisting confirmation of assessments, or judgments, and appellant is barred from raising them here. *Albrecht v. City of St. Paul*, 47 Minn. 531; *State v. Norton*, 63 Minn. 497; *State v. District Court of St. Louis Co.*, 61 Minn. 542; *Fitzhugh v. Duluth City*, 58 Minn. 427; *Hennessy v. City of St. Paul*, 54 Minn. 219; *Keating v. Craig*, 73 Mo. 507. A judgment rendered with jurisdiction, and upon due notice, is conclusive against all the world. *Chauncey v. Wass*, 35 Minn. 1; *Board of Co. Commrs. v. Morrison*, 22 Minn. 178; *City of Duluth v. Miles*, 73 Minn. 509. Mortgagees are included in the terms "owner" and "parties interested" as used in the charter of Duluth. See *Randolph, Em. D.* § 340; *Sherwood v. City*, 109 Ind. 411; *Severin v. Cole*, 38 Iowa, 463; *State v. Easton*, 36 N. J. L. 181; *Ellis v. Welch*, 6 Mass. 246; *Parks v. City*, 15 Pick. 198; *Watson v. New York*, 47 N. Y. 157; 1 Jones, Mort. § 708.

Were the language of the charter ambiguous, and capable of construction, public policy would demand that it should be held that the assessment lien is prior and paramount to all others. See *Board of Commrs. v. Anderson*, 15 C. C. A. 471; *City v. Ridge*, 102 Pa. St. 190; *Fager v. Campbell*, 5 Watts, 287; *Parker v. Baxter*, 2 Gray, 185.

The mortgage was made subject to the law providing for the assessment, collection and lien of assessment on land in the city of Duluth, and hence plaintiff is estopped to deny the city's superior rights in the property. See *Smith v. Stevens*, 36 Minn. 303; *Peo-*

ples v. Tripp, 13 R. I. 621; Hersee v. Porter, 100 N. Y. 403; Brine v. Insurance Co., 96 U. S. 627; Morrow v. Dowes, 28 N. J. Eq. 459.

START, C. J.

On August 26, 1890, Messrs. Sherwood and Smith were the owners in fee of the ten acres of land described in the complaint, which was then vacant and unplatted, without any streets or highways upon it. On that day they executed a mortgage thereon to the plaintiff, which was duly recorded, to secure the payment of \$10,000 on August 24, 1894, with interest. On February 9, 1891, a petition was duly presented to the common council of the defendant city, praying that a street be opened, graded, and otherwise improved over the land in question and other lands. Thereafter, and in the month of April, 1891, the defendant procured a deed from plaintiff's mortgagors for an easement in a public street in a strip of land 66 feet wide over their land; and thereupon it established, opened and improved such strip as a public street, which was and is known as "Superior Street." The defendant did not acquire from the plaintiff the right so to open and establish the street over the land so mortgaged to her.

The board of public works of the city on December 16, 1892, levied an assessment upon that portion of the mortgaged premises lying within 150 feet of either side of Superior street for the sum of \$3,143.42, as its share of the cost of the improvement. This assessment, at the request of the fee owners, was divided into five parts, to become due at five several annual dates, commencing October 1, 1894. The district court on May 27, 1893, confirmed the assessment; and on February 6, 1895, judgment was entered against the land for the first instalment of the assessment. Judgments were in like manner rendered for the second and third instalments of the assessment on March 26, 1896, and March 13, 1897, respectively. The real estate was offered for sale on each of the three judgments, and bid in by the defendant.

The plaintiff on August 29, 1895, became the owner of the real estate in controversy, by a foreclosure of her mortgage, except as against the defendant. See *Morey v. City of Duluth*, 69 Minn. 5, 71 N. W. 694.

The plaintiff brought this action to set aside the assessments, the judgments and the sales in question, upon the ground that the lien she acquired by virtue of her mortgage was superior to the lien of the assessment and judgments, and that the lien of the latter was extinguished by the foreclosure of the mortgage.

The trial court found all of the proceedings culminating in the assessment and judgments to have been regularly taken, but that the notice of the sales under the judgments was insufficient; and, as a conclusion of law, that the sales be set aside, but that the assessment and judgments were liens upon the land of the plaintiff paramount to all of her interests therein. The plaintiff appealed from an order denying her motion for a new trial, and assigns as error that the court erred in its conclusion of law that the defendant's lien is paramount to the plaintiff's title to the land.

The plaintiff's contention is: First. The lien of the defendant could not and did not become paramount to the lien and interest of the plaintiff. Second. If, in any event, defendant's lien could have become paramount, it did not do so, for the reason that defendant did not acquire title to the strip improved as a street, and could not lawfully assess the abutting property without having acquired such title.

1. In support of the plaintiff's first proposition it is urged that the charter of the city of Duluth under which the assessment was made, confirmed and the judgments entered, does not make the assessment a paramount lien on the premises, and that the plaintiff's mortgage being an existing lien at and before the lien of the assessment attached, the former is superior to the latter. And, further, that her interest in the land being that of mortgagee, and not that of owner, she had no right to appear and oppose the assessment and the entering of the judgments. If this is correct, it would follow that the order confirming the assessment and the judgments would not be *res adjudicata* as to her and her interest in the land, as the defendant claims, for if such be the case the court had no jurisdiction of either her or her interest in the land. It is necessary then to examine the merits of her claim.

The charter provisions as to the assessment and judgments may be summarized as follows: At the time and place, specified in a

notice to be previously published, for the hearing of an application to the district court for an order confirming the assessment, any parties interested therein may appear and make objection to the same; the court must hear any objection to the same by parties interested, and all persons may appear in person, or by attorney, and object to the assessment or any part thereof. After the making of an order by the court confirming the assessment, it is to be deemed in all things *res adjudicata* and, from and after filing the assessment roll in the office of the board of public works, the assessment becomes a lien upon each and every parcel of land therein described. The comptroller within ten days after the assessment is confirmed must publish a notice to parties interested in the assessment, that a duplicate roll thereof has been delivered to him. He must also cause at least twenty days notice, by publication for ten days, of his intended application to the court for judgment against the property upon which the assessment has been made, which notice must contain a description of the judgment and require all persons interested to attend. The owner of any of the property may appear at the time designated in the notice, and file objections to the recovery of judgment against his property. If no owner appear and object, judgment is to be rendered against each parcel of the land for the amount of the assessment, interest and costs. Where a defense is made and judgment is entered against the property, the appearance of the defendant is required to be entered of record. All deeds to purchasers of the land at a sale under the judgment are *prima facie* evidence of title in the grantee, after the expiration of the time of redemption. All deeds or conveyances of the land affected by the assessment are subject to the lien thereof from and after the date of the filing and confirmation of the assessment roll. See Sp. Laws 1887, c. 2, subc. 5.

It is true, as claimed by plaintiff, that the lien of the assessment attaches at a time fixed by the charter, that is: from and after the time of the confirmation of the assessment roll and filing thereof; but this does not justify the conclusion that the lien is subordinate to all prior liens on the land, although the charter does not expressly declare that the lien of the assessment is paramount to all other liens.

When the several provisions of the charter to which we have referred are read and considered together, it is clear that the only reasonable construction which can be given to them is that the lien of the assessment, when it once attaches, affects all interests in, or liens upon, the property without reference to the time when they are acquired. Therefore the assessment is the paramount lien on the property precisely as if the assessment were a general tax. Any other construction would practically defeat the whole scheme for local improvements provided for by the charter. The legislature had the undoubted power to so make the assessment the paramount lien. *Provident Institution for Savings v. Jersey City*, 113 U. S. 506.

The proceeding authorized by the charter to charge land with the cost of local improvements to the extent of benefits received therefrom is one in rem. It is the whole interest in the land that is assessed for the improvement, not some particular estate therein. The improvement is for the benefit of all interests in the land, for that of the lienholder as well as that of the fee owner, and necessarily the lien of the assessment for the improvement must be co-extensive with the estate benefited and assessed. 2 Blackwell, Tax Tit. §. 695. If the land is sold under the judgment, the whole estate and interest of all parties therein passes to the purchaser, subject to the right of redemption, and the deed is made *prima facie* evidence of title in the grantee. The title conveyed by the deed is the whole interest in the land, not simply that of the fee owner.

It is true that liens of the class to which assessment liens belong are purely statutory, and that their existence and extent depend on the statute. But our construction of the charter is that it does, by necessary implication, provide that the lien of the assessment on the property benefited by the improvement shall be paramount to all other interests therein, including prior mortgages or other liens thereon.

It is further urged that under the provisions of the charter only owners of the land, in the strict meaning of the term, that is: those who possess the legal title, are permitted to appear and defend against the entry of judgment for the assessment; hence, the plaintiff being only a mortgagee, never had any right or opportunity to

be heard. It is apparent, however, from the provisions of the charter, that the word "owner" is not used therein in its strict sense, but that it means persons interested in the land, which includes mortgagees. Thus, all persons interested in the assessment are given the right to appear at the hearing on the application for confirmation of the assessment, and it is the duty of the court to hear them.

And, further, the comptroller is required to publish a notice to parties interested that the assessment roll has been delivered to him, and to publish notice of his application for judgment, in which the land must be described, and all persons interested required to appear before the court at the time stated in the notice, at which time the owner of the land—that is, any person interested therein—may appear, in person or by attorney, and file objections to the entry of judgment against his property. It is manifest that mortgagees are included in the terms "parties interested" and "owner," as used in the charter. See *Severin v. Cole*, 38 Iowa, 463; *Sherwood v. City*, 109 Ind. 411, 10 N. E. 89; *State v. Easton*, 36 N. J. L. 181.

2. The plaintiff's second and last claim is that the city did not acquire title to the street over her land, and, therefore, could not lawfully assess the abutting land without having acquired such title. The defendant did acquire title to the street by its deed from the then owners in fee, subject only to the lien of the plaintiff's mortgage thereon, and entered into possession thereof and made the improvements. In doing so it was not a trespasser. It had the right to possession of the street, and to make the improvements, by virtue of the deed.

If, as claimed, the assessment was premature, because the city had not then extinguished her lien upon the street, it was a defense which the plaintiff might have urged in resisting the confirmation of the assessment and the application for judgment. Having failed to do so, she is now concluded as to this defense by the judgment. *Hennessy v. City of St. Paul*, 54 Minn. 219, 55 N. W. 1123.

Order affirmed.

JOHN OLSON v. CLARA VEDELER FISH and Others.

January 6, 1899.

Nos. 11,443—(175).

Bond to Secure Distribution of Estate of Decedent—Mistake of Sureties—Estoppel.

In an action by a creditor upon a bond given by the sole heir at law to secure a decree of distribution of the estate of the decedent to her, which was conditioned to pay the debts of the deceased and the expenses of administration, the sureties made the defense that they executed the bond supposing it to be the bond of the administratrix, as such, and not, as heir, to secure the distribution of the estate. No fraud was claimed. They could read and write, but they neither read the bond, nor made inquiry as to its provisions or effect. The probate court made the decree of distribution upon the faith of the bond. *Held*, that the sureties are estopped to deny the execution or validity of the bond, as to creditors.

Finding Sustained by Evidence—Statute of Limitations.

Held, that the evidence sustains the finding of the trial court to the effect that the probate court made the decree on the faith of the bond, that plaintiff was a creditor of the deceased, and that his cause of action was not barred by the statute of limitations.

From a judgment of the district court for Polk county in favor of plaintiff for \$821.57, entered pursuant to the findings and order of Ives, J., defendants Royem and Rapp appealed. Affirmed.

A. A. Miller, for appellants.

Albert Johnson, for respondent.

START, C. J.

This was an action by the plaintiff, as a creditor of the estate of Minton Holmes, deceased, on a bond executed by Clara Holmes, his wife and sole heir at law, as principal, and her co-defendants, as sureties, to the judge of probate of the county of Polk, for \$1,000, conditioned that, if she should receive her share of the estate of the deceased by the decree of the court, she would pay the debts of the deceased and the expenses of the administration. The answer of the sureties was a general denial.

As found by the trial court the facts are substantially that Minton

Holmes on October 9, 1892, died intestate in the county of Polk, leaving his widow, Clara Holmes, him surviving, who has since remarried, and is now known as Clara Vedeler Fish. He died seised of certain real estate in Goodhue county. On December 12, 1892, his widow was by the probate court of Polk county duly appointed administratrix of his estate, and letters of administration were duly issued to her. On the next day she presented her application and affidavit to the probate court for a decree distributing the entire estate of the deceased to her as his sole heir, and the bond which is the basis of this action was delivered to the court and duly recorded. The probate court, upon the application, affidavit and bond, made its decree on December 13, 1892, assigning to and vesting in Clara Holmes, as such heir, all of the estate of the deceased. Other than this bond, no provision was made for the payment of the debts of the deceased.

Minton Holmes, on December 23, 1889, executed for value his promissory note to the plaintiff in the sum of \$500, which he promised to pay, with interest. The probate court by its order duly limited the time for presenting claims against the estate, and fixed a time for a hearing thereon. The plaintiff duly presented and made proof of his claim, which was allowed in the sum of \$600 by the court on July 10, 1893,—the day appointed for the hearing. Plaintiff thereafter duly demanded the payment of his claim, but the defendants have never paid it.

Plaintiff was duly authorized and given permission by the order of the probate court to prosecute this action on the bond in his own name and for his own benefit. As a conclusion of law, the trial court found that the plaintiff was entitled to recover from the defendants the amount of his claim against the estate of the deceased. The sureties on the bond appealed from the judgment entered upon the findings.

The appellants assign several alleged errors as to the admission of evidence on the trial which are not discussed or referred to in their brief. The real contention of the appellants is that the evidence conclusively shows that they executed the bond as and for an administrator's bond, that it was so treated by the probate court, and that it did not make its decree assigning the estate by reason

of the bond; hence the findings of the trial court are not sustained by the evidence.

The evidence shows that the bond is, in form and in substance, a bond such as G. S. 1894, § 4664, requires as a condition precedent to the making of the decree in question. It also shows that the judge of probate gave to one of the sureties a printed form for such a bond, without any statement or representation whatever, which the sureties executed and acknowledged after the blanks were filled, without reading or inquiry, supposing it to be an administrator's bond; that both the sureties were intelligent business men, and able to read and write, and that the bond, after the petition for the appointment of the widow as administratrix was made, but before the hearing thereon, was filed with the probate court; and, further, that the decree did not recite the giving of the bond, but that on the day it was made the probate court recorded the bond, and indorsed his certificate of such record upon the bond, and made in the probate registry this entry: "Bond of heir, devisee, or legatee filed."

There was no affirmative evidence in the case that any general bond was given by the administratrix. Where an executor is the sole or residuary legatee, and he gives a bond to pay the debts and legacies, no general bond as executor is required. Section 4460. Where the administrator is the sole heir, and gives the statutory bond to pay the debts and expenses of administration for the purpose of securing a distribution to him of the estate, there is no more necessity for his giving a general bond before letters of administration are issued to him than there is in the case of an executor and sole residuary legatee. In either case the bond is a substitute for the estate for the payment of creditors.

The bond which an administrator is required to give is substantially the same as is required of an executor, with such variations as are necessary to make it applicable to the case of an administrator. G. S. 1894, § 4482. Therefore it would seem that where the administrator is the sole heir, and gives the bond to secure a decree of distribution of the estate to him, no general bond as administrator is required by the statute. Evidently such was the construction given to the statute by the probate court in this case, but whether it was right or wrong is immaterial, for the omission

to give an administrator's bond in this case was an irregularity which would not render the order appointing the administratrix void in a collateral action.

The evidence fully sustains the finding of the trial court that the defendants executed the bond in question, and that the decree distributing the estate was made upon the faith of such bond. The claim of the sureties that they did not know the contents of the bond, and signed and acknowledged it supposing it to be the administratrix's general bond, cannot be entertained for a moment. They are estopped to deny its execution or force as against creditors. *Engstad v. Syverson*, 72 Minn. 188, 75 N. W. 125.

The appellants make the further claim that this action is barred by the statute of limitations. The action is upon the bond, not upon the note; and conceding, without so deciding, that the judgment of the probate court in allowing the claim is not binding on the obligors in the bond (see *Durfee v. Abbott*, 50 Mich. 278, 15 N. W. 454), the fact remains that the respondent on the trial made plenary proof that he had a valid and enforceable claim against the estate of the deceased at the time the bond was executed and the decree made. Besides, the statute of limitations was not pleaded, nor did it appear from the evidence that an action on the note was barred when this action was commenced.

Judgment affirmed.

FRANK A. NOLAN v. JOHN RANKIN DYER and Another.

January 9, 1899.

Nos. 11,297—(153).

Equity—Failure to Redeem from Foreclosure of Mortgage—Fraud—Practice.

Through fraud and imposition of D., then owner of certain real property, and holder of a certificate of foreclosure sale upon foreclosure by action of a first mortgage on the property, the plaintiff, N., who was a trustee in several subsequent mortgages, was prevented from redeeming in due time. N. was not a party to the action foreclosing the first

mortgage. *Held*, that N. might maintain an action for relief; that the remedy, if any, by motion in the foreclosure action, was not exclusive.

Action in the district court for Ramsey county by plaintiff, as trustee, to set aside an assignment of the sheriff's certificate of sale upon foreclosure of the first mortgage, to have the lien of certain mortgages held by plaintiff declared superior to that of said sheriff's certificate of sale, and to set aside the final decree and amended decree in the action to foreclose the first mortgage. The facts are stated in the opinion. The case was tried before Otis, J., who ordered judgment in favor of plaintiff. From an order denying a motion for a new trial, defendants appealed. Affirmed.

John H. Long, A. S. Keyes and John W. Kerr, for appellants.

The final decree to Beverly A. Dyer remaining in full force and effect cannot be attacked in a collateral action, as is here sought to be done. *Rogers v. Holyoke*, 14 Minn. 158 (220); *Hotchkiss v. Gutting*, 14 Minn. 408 (537). That decree is final not only as to the matter determined, but as to every other matter which the parties might have litigated in the cause. *Vail v. Vail*, 7 Barb. 226; *Bruen v. Hone*, 2 Barb. 586; *Embury v. Conner*, 3 N. Y. 511. One who might have been a party to a former action, cannot maintain a separate suit to set aside a sale or decree rendered in that action. *Rogers v. Holyoke*, *supra*; *Ebert v. Long*, 43 Minn. 235.

Oscar Hallam and N. H. Clapp, for respondent.

Judgment obtained at law, or in equity, where the defendant was deprived of his defense by accident or by fraud in the party in whose favor it was rendered, will be set aside. 2 Pomeroy, Eq. Jur. §§ 871, 914-919; 3 Id. § 1377; *Babcock v. McCamant*, 53 Ill. 214; *Nevil v. Clifford*, 55 Wis. 161; *State v. Phoenix*, 33 N. Y. 1; *Whittlesey v. Delaney*, 73 N. Y. 571; *Mandeville v. Reynolds*, 68 N. Y. 528; *Jordan v. Volkenning*, 72 N. Y. 300; *Stevens v. Central*, 144 N. Y. 50; *Hamilton v. Wood*, 55 Minn. 482; *Mann v. Flower*, 26 Minn. 479; *Johnston v. Paul*, 23 Minn. 46; *Stewart v. Duncan*, 40 Minn. 410. Where a party has been misled or prevented, by some assurance or deception, from presenting the merits of his claim or defense, and there has been in fact "no adversary trial" or "real contest," a case is pre-

sented for equitable interference. See *Hentig v. Sweet*, 27 Kan. 172; *Pearce v. Olney*, 20 Conn. 544; *Wierich v. De Zoya*, 7 Ill. 385; *Johnson v. Unversaw*, 30 Ind. 435; *Dobson v. Pearce*, 12 N. Y. 156; *Hibbard v. Eastman*, 47 N. H. 507; *U. S. v. Throckmorton*, 98 U. S. 61; *Hamilton v. Wood*, *supra*.

John R. Dyer is estopped by the covenants in the mortgages given by Benjamin, his grantor, to plaintiff, from setting up this title against plaintiff. See *Sandwich Mnf. Co. v. Zellmer*, 48 Minn. 408; *Calkins v. Copley*, 29 Minn. 471; *Allison v. Armstrong*, 28 Minn. 276; *Washington L. & T. Co. v. McKenzie*, 64 Minn. 273; *McEwen v. Beard*, 58 Minn. 176; *American Baptist M. U. v. Hastings*, 67 Minn. 303; *Fells v. Barbour*, 58 Mich. 49; *Hooper v. Henry*, 31 Minn. 264. Dyer being the grantee of Benjamin was under the same disability as Benjamin himself.

BUCK, J.

On February 28, 1889, the Minnesota Scale Company, a corporation, executed a mortgage to the People's Trust Company on lots 8, 9, 10 and 12 in block 1, and lot 30 in block 8, in King's addition to St. Paul, which mortgage was subsequently assigned to E. A. Jaggard, who subsequently foreclosed the same by action, and took a sheriff's certificate of said sale to himself. Subsequent to the giving of such mortgage, but prior to the foreclosure proceedings, one Franklin Benjamin acquired title to said property, and, as owner thereof, executed mortgages on the same property to the plaintiff, as trustee of an express trust for several mortgagees.

After the execution of said mortgages and the foreclosure thereof by Jaggard, and on September 22, 1896, Benjamin sold and conveyed said property to John Rankin Dyer by warranty deed. This deed was made expressly subject to the sum of \$900 due Jaggard as redemption money on his certificate of sale, which would operate for the benefit of the several mortgagees, for whom the plaintiff, Nolan, was trustee as above stated. This amount was then deducted from the price agreed to be paid to Benjamin by said Dyer, who continued to be the owner of said property up to the time of the commencement of this action. J. R. Dyer procured from Jaggard an assignment of the certificate of sale on said mortgage fore-

closure, paying therefor his own money, but causing the name of a relative, Beverly A. Dyer, one of these defendants, to be inserted in said certificate instead of his own, without the knowledge or consent of said Beverly A. Dyer, who disclaims ever having acquired any right or interest in said premises by reason of the assignment to him of said certificate.

John Rankin Dyer promised plaintiff, at divers times before the expiration of the time for redeeming said premises from the mortgage foreclosure, to redeem said premises from such sale, and afterwards represented to plaintiff that the same had been paid, and the same representation was made to plaintiff by said Jaggard, all of which representations plaintiff believed and relied upon; and he took no steps to redeem, although he was then, and at all times had been, ready, willing and able to redeem, and would have done so if said representation had not been made.

Other facts appear in the record tending to show the fraudulent acts and representation of John Rankin Dyer, with a view on his part to defraud plaintiff as such trustee in the matter, which need not be stated further in detail, as it was conceded upon the oral argument in this court that the question of practice was substantially the real and only question to be decided.

Upon the finding of facts the trial court found as conclusions of law:

"Plaintiff is entitled to judgment against the defendants, and each of them, adjudging that all the right, title or interest in said premises or any part thereof, of said defendant Beverly A. Dyer, is subject and subordinate to plaintiff's said mortgages; that said Beverly A. Dyer took, and now holds, the assignment of certificate of sale aforesaid, and any rights accrued thereunder, for the use and benefit of said John Rankin Dyer, and subject to his order and direction, all of which are subject and subordinate to said mortgages,—and adjudging said premises redeemed from the foreclosure sale aforesaid to said Jaggard, and vacating and setting aside, and declaring null and void, said final decree and amended decree so procured, and adjudging that the mortgages to plaintiff above mentioned are valid and subsisting liens upon said premises, and each and every part thereof, and upon all the right, title and interest of said John Rankin Dyer therein, and of said Beverly A. Dyer, and of all persons claiming any right, title or interest in said premises under or through purchase from said defendants or

either of them, since the 15th day of April, 1897, and adjudging the lien of said mortgages to be prior to the rights of any of the defendants herein, or any such person or persons claiming under them, or either of them, in the premises. Let judgment be entered accordingly."

The question of practice involved is this: Can the final decree in the foreclosure suit be attacked in this action, or should the proceeding have been by motion in the original action? We are of the opinion that this suit in equity, so far as it concerns the plaintiff, can be maintained against these defendants.

It is to be noted that none of the parties to this suit were parties to the foreclosure suit, nor in any way connected with it; and the court distinctly found that the defendant John Rankin Dyer perpetrated an actual fraud upon plaintiff, whereby the latter was deprived of the right or opportunity to redeem, and consequently the mortgagees, for whom he is the trustee, lose their mortgage interest in the land, without any fault on their or his part, unless this action can be upheld. The facts found show a premeditated fraud, clearly established; and to that extent such iniquity should be condemned, and Dyer not be permitted to enjoy the fruits thereof.

It is also to be observed that the fraud complained of did not exist at the time of the commencement of the former action, nor when the time expired for answering the complaint in foreclosure therein, and that plaintiff did not know of its perpetration until after the expiration of the period for redemption, nor until after the application for final decree. His silence and omission to act sooner are naturally and reasonably accounted for by his not being a party to the former action, and by the fact that he was deceived and misled by the misrepresentations of John Rankin Dyer, both before and after the time for redemption had expired, and by the statement of Jaggard that the amount due on his certificate of sale had been paid, made before the application for final decree.

John Rankin Dyer was not an adverse party in the former suit, and in no way appeared therein, and, as he was the moving spirit in the transaction whereby plaintiff was deceived and misled to his injury, plaintiff should be permitted to maintain this suit in equity,

especially as he was a nonresident of the state, and it is somewhat doubtful if jurisdiction could have been obtained over him, even if an attempt by motion had been sought to open the former proceedings or decree or judgment, and, if so, it is apparent from this and other facts in the case that such attempt would have been uncertain, if not inadequate and futile.

Of course, the issue of fraud or no fraud was not adjudicated in the former action, either as a question of law or in equity. The iniquity of the transaction was in no manner involved in the execution of the mortgage, or the foreclosure thereof, but relates solely to the fraud of the defendant in deceiving the plaintiff in the matter of redemption from the foreclosure sale, whereby he sought, to obtain, and now seeks to retain, an unconscionable advantage of the plaintiff as trustee of subsequent mortgages.

"Fraud and imposition invalidate a judgment, as they do all acts, and may be alleged whenever the party seeks to avail himself of the results of his own fraudulent conduct by setting up the judgment the fruits of his fraud. * * * Judgment obtained by fraud upon a court binds not such court, or any other, and its nullity upon that ground, though it has not been set aside or reversed, may be alleged in a collateral proceeding." *Mandeville v. Reynolds*, 68 N. Y. 528, 543.

In the case of *Hamilton v. Wood*, 55 Minn. 482, 57 N. W. 208, the grantee of premises subject to a mechanic's lien settled with the plaintiff, who held the lien, and had commenced an action to foreclose it, and he had agreed to dismiss the suit. This was before the time for answering had expired, but he failed to dismiss the action, and caused judgment for foreclosure sale to be entered, without the knowledge or consent of the purchaser of the premises. When the owner of the lien sought to enforce it by sheriff's sale, the purchaser brought an action for temporary injunction, and to have the judgment set aside. The injunction was granted, and upon appeal to this court the order was affirmed. It was there said, at page 486:

"Another objection urged is that plaintiff had an adequate legal remedy; that he ought to have applied for relief in the original action for the enforcement of the lien; that he might have procured a stay of proceedings, and moved to set aside the judgment, and been admitted to defend in that action. It is undoubtedly true that, hav-

ing succeeded to the title of the property in question, he would have had a standing in court to apply for such relief. But plaintiff was not confined to this remedy. The equitable remedy to restrain by injunction a sale which is unwarranted and inequitable * * * is well established, and is clearly contemplated by G. S. 1878, c. 66, §§ 200, 204." "The entry of judgment after the claim was settled was in violation of the rights of the plaintiff, and a fraud upon him. * * * These allegations afford ample justification for the injunction, and the inquiry into the validity of the judgment and lien properly falls within the jurisdiction of the court in the injunction action."

We perceive no distinction between a proceeding to enjoin the fraudulent use of a judgment itself obtained by fraud and the right of the plaintiff in this case by a proceeding in equity to bar the defendant from using his fraudulent decree and judgment obtained by fraud. Fraud is a matter of equity jurisdiction, and in the case cited, as well as in the case at bar, equitable relief was and is sought against a fraud not denied, or at least directly found in favor of the plaintiff.

Order affirmed.

J. C. ROLLOFSON and Another v. EDWARD N. NASH.

January 9, 1899.

Nos. 11,400—(187).

Levy upon Execution—Claim of Title by Third Party—Possession Evidence of Title—Declarations.

In an action where the title to personal property is involved, a party may prove that the person through whom he claims title had possession and control of such property as prima facie evidence of ownership, and, the act of possession having been proven, the declarations of such person while in possession, indicating the character of the possession, are also admissible in evidence, whether made in the presence of the adverse party or not.

Verdict Justified by Evidence.

Held, also, that the evidence justified the verdict.

Action in the district court for Grant county against defendant

sheriff to recover \$2,000 for the conversion of certain merchandise. The cause was tried before C. L. Brown, J., and a jury, which rendered a verdict in favor of defendant. From an order denying a motion for a new trial, plaintiffs appealed. Affirmed.

C. J. Gunderson, for appellants.

Andrew O. Ofsthun, for respondent.

BUCK, J.

On November 18, 1896, Ole J. Lee, as plaintiff, recovered a judgment against one Mathias Rollofson, father of the plaintiffs in this action, for the sum of \$251.45. The Rollofsons lived near the village of Hoffman, Grant county, in this state, one son being 25 years old and the other aged 22 years. About May 1, 1897, or the latter part of April, the plaintiffs started a store in Hoffman; and on September 18 of that year the defendant, Nash, as sheriff of that county, by virtue of an execution issued on said judgment, levied on a large amount of goods in said store as the goods of the father, Mathias Rollofson, claiming that the goods belonged to him; and thereupon the plaintiffs brought this action against the defendant sheriff, claiming that the goods levied upon were their property, and seek to recover from the defendant the value thereof, which they allege to be \$1,200, and also claim damages for the interruption of their business.

The defendant answered, alleging that the goods levied upon belonged to the father, and not to the sons. At the trial the question of ownership of the goods was submitted to the jury, and it rendered a verdict in favor of the defendant. The court denied the plaintiffs' motion for a new trial, and they appealed.

The questions of fact appear to have been controverted upon the trial; the controversy was actual and substantial; and there was sufficient evidence to sustain the verdict.

Errors of law herein are assigned as to the admission of declarations of the father, Mathias Rollofson, as to his ownership or interest in the goods. It was conclusively proven that Mathias Rollofson was in the store nearly all the time where the goods were kept for sale.

While he was in the store alone, a man came in and asked Ma-

thias Rollofson how much he owed him, and said that he thought the latter needed the money, and he came in to pay it. Thereupon Rollofson turned to the books, and told him the amount. The man paid it, and Rollofson gave him a receipt. This matter may be considered in connection with the testimony of another witness, who testified that during the months of June and July, 1897, when the father was in the store alone, a conversation took place between them in regard to the witness bringing a stock of goods up there, when the father said: "Well, I have this store, and I might get a chance to put in some clothing there." At that time he never mentioned his sons.

It is the contention of appellants that, as both plaintiffs were absent at the time the talk took place, it should not be admitted as evidence against them. But this admission that the father was there alone militates against them, for it shows that the father was then in possession and control of the goods.

About the time that plaintiffs claim to have commenced business, the father, although claiming to be insolvent, went to La Crosse, Wisconsin, and purchased merchandise to the amount of \$1,000 of one Mons Anderson, and then paid him in cash \$650, and it is fairly inferable from the evidence that this was the father's own money, less perhaps the sum of \$50. These goods were shipped to the village of Hoffman, and several boxes were consigned to M. Rollofson & Sons, and receipted for by them, and some of the said boxes were consigned to M. Rollofson. The exact date when plaintiffs went into business is not satisfactorily stated, but it is not claimed that these goods so consigned to M. Rollofson & Sons did not go into plaintiffs' store, where the father was engaged in conducting the business or assisting in doing so.

Prior and subsequent to this time the father had also become security for plaintiffs in the sum of several hundred dollars, which has not been paid, and which amount went into plaintiffs' business. The father had also transferred his farm to one of these plaintiffs, and by him it was conveyed to his mother, without any consideration passing in either case.

It seems to be settled in some courts, at least, that where the title to personal property is involved, a party may prove that the person

through whom he claims title had possession and control of such property, as prima facie evidence of ownership; and, the act of possession having been proven, that the declarations of such person while in possession, indicating the character of the possession, are also admissible in evidence, whether made in the presence of the adverse party or not. *Maus v. Bome*, 123 Ind. 522, 24 N. E. 345; *Elwood v. Saterlie*, 68 Minn. 173, 71 N. W. 13. See also *Lehmann v. Chapel*, 70 Minn. 496, 73 N. W. 402. This doctrine, of course, renders the proof that the father was in possession and control of the property in question admissible in evidence, although the plaintiffs were absent when the statements and declarations of the father were made.

We are of the opinion that these facts justified the trial court in submitting the question of the ownership of the property to the jury. There were sufficient facts, including the conduct of the father, to submit to the jury whether the latter was engaged with the sons in an enterprise wherein the property used in the concern was that of the father, and in such case the latter's possession and control of the property made his declarations admissible in evidence as part of a transaction on which the right of creditors depended. Such statements of a person who has participated in the transaction are not considered mere hearsay, but legitimate evidence of the act done, and are thus competent evidence. 2 Rice, Ev. p. 960.

It remains, however, for us to consider the question of the admission in evidence of the witness Sethney, who was permitted to testify that Mathias Rollofson had told him that he had built a store in Hoffman next to the store he had occupied; that he was going to commence business, or had commenced, there, and was not thinking of putting in clothing; that it would be an object to bring up some clothing there. Part of this evidence was objected to, but no grounds of objection stated, and no exception taken. And it further appeared that it was offered as evidence impeaching Mathias Rollofson, who had previously testified directly to the conversation; hence this question need not be further considered.

There are no reversible errors in the record, and the order denying the plaintiffs' motion for a new trial is affirmed.

MITCHELL, J.

I concur. To render the father's declarations characterizing his possession admissible, it was not necessary that the evidence of his possession should have been conclusive. If there is evidence tending to prove that the declarant was in the possession and control of the property, then his declarations characterizing that possession are admissible; the weight, if any, to be given to them being, however, dependent upon how the jury should find upon the question of possession. On this phase of the case the plaintiffs did not request the court to give the jury any instructions.

In my opinion, there was evidence reasonably tending to prove that the father was, with the consent of the sons, in the actual possession and control of the property. I am also of opinion that the evidence justified the jury in finding that the property actually belonged to the father, although ostensibly and colorably held out as belonging to the sons. This covers the whole case.

CANTY, J.

I concur with Justice MITCHELL.

MARSHALL & ILSLEY BANK v. FRANK M. CADY and Others.

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January 9, 1899.

Nos. 11,445—(101).

Foreclosure of Mortgage—Appointment of Receiver before Sale.

Held that, upon the evidence, the court did not err in appointing a receiver of the mortgaged premises during the pendency of an action of foreclosure.

Action in the district court for Ramsey county to foreclose a mortgage and for the appointment of a receiver. From a judgment in favor of plaintiff, entered pursuant to the findings and order of Otis, J., defendant Cady appealed. Affirmed.

Charles J. Berryhill, for appellant.

William G. White, for respondent.

PER CURIAM.

Assuming, without deciding, that an order appointing a receiver in foreclosure during the pendency of the action can be reviewed on appeal from the final judgment or decree, we are of opinion that, while the plaintiff did not present a very strong case, yet we could not hold that the court abused its discretion in appointing a temporary receiver. The affidavits presented would have justified the court in finding that the mortgaged premises were inadequate security; that the mortgagor was insolvent; that for four years taxes were unpaid and delinquent, for three of which the premises had been sold, and were unredeemed, that portions of the building on the premises were somewhat out of repair, that repairs were necessary for the full preservation of the property, and that the mortgagor was receiving rent for part of the premises, which he was not applying to the payment of taxes or the making of repairs. There was some evidence that the mortgagor was using a part of the building as his sleeping apartments, and, hence, that the premises were his homestead.

While a court should ordinarily require a somewhat stronger showing for the appointment of a receiver of the mortgagor's homestead than in the case of other property, yet, when a debtor mortgages his homestead, he subjects the property to all the ordinary legal and equitable rights of a mortgagee, among which is the right to have a receiver appointed when necessary to prevent waste or to preserve the property. The same facts which would justify the court in appointing a receiver during the pendency of the action would justify it in providing in the final judgment that the receivership should be continued.

As there is neither a "case" nor bill of exceptions, the question whether the evidence justified the findings is not presented. The findings are presumed to have been based upon the evidence introduced on the trial, and not upon the affidavits presented on the motion for the appointment of a receiver during the pendency of the action.

The judgment is silent as to the duration of the receivership. No point is made on this by the defendant; but we mention the fact in order that it may not be inferred that we impliedly hold that a

receivership could be continued after a foreclosure sale, or that the rents and profits of the property could be applied towards paying the mortgage debt, or used for any other purpose than to prevent waste and preserve the property. The judgment should be affirmed.

So ordered.

BUCK, J. (dissenting).

I dissent. I think that the evidence quite conclusively shows that the premises are Cady's homestead, and this is one of the material facts that lead me to think that the receiver should not, upon the evidence adduced, have been appointed. When the trial court appointed the receiver, it was done by the court upon affidavits submitted by the respective parties. The application therefor was made in the month of July, 1897, but not granted until October 29, 1897. All of the affidavits upon which the receiver was appointed appear in the record, and the sufficiency of the plaintiff's affidavits is assailed and contradicted by the defendants' counter affidavit.

Not only was a receiver appointed by order of the court, and therein directed to collect, all and singular, the rents, profits and income of the premises, but by a subsequent order of the court the defendant Cady was ordered, within five days after the service upon him of the order, to quit, surrender and deliver to the receiver said premises, and vacate the same.

It is true that the judgment appealed from is dated November 12, 1897, and the last order directing the defendant Cady was not made until November 20, 1897, and not appealed from. But, as I regard this case, this is immaterial. The gist of the controversy is over the right to appoint a receiver at all. Probably, if there existed a sufficient cause to appoint a receiver in the first instance, and the case appeared to be one where ordinarily the right of a receiver to act at all was presented, the appointment would carry with it the right to the possession of the property. It is the right to invoke the aid of the court in the first instance, upon the case being presented, which in my opinion is one of more than serious doubt.

Such a proceeding is an extraordinary remedy, sometimes, and

perhaps I might say frequently, operating harshly, and the circumstances of peril which invoke the remedy should be established with reasonable certainty. Such appointment is not a matter of right, and should not be used where its exercise will produce injustice, and the fact should be clearly proved. Beach, Rec. (Alderson's Ed.) § 48. And this rule is strictly applied in mortgage cases, where it must clearly and fairly appear that the security is inadequate, or there is imminent danger of waste, removal or destruction of the property. Id. 574.

Mere default in the payment of the debt would not be sufficient ground for the appointment of a receiver. It is true that power to make the appointment of a receiver is generally discretionary, yet,

"The judicial authority to deal with property by means of a receiver is not unlimited or absolute." Id. § 1. "It is to be exercised in conformity to the general principles of equity jurisprudence. The petitioner should, therefore, state clearly the facts upon which the application is made, and also give proof of the same. If this is not done, the relief will be denied, and the burden of proof is always on the petitioner." Id. § 524.

As I differ from my associates, it is proper that I should fully examine the evidence which formed the basis for such appointment. The only evidence presented was by affidavits. The plaintiff presented three which showed that the property was worth \$3,500, and one that the house alone was worth \$1,500. The defendants presented five affidavits which showed that the value of the property ranged from \$5,800 to \$4,400, averaging \$5,220, and the affidavit of another person states the value of the house to be \$2,500 alone. The total average value of the property was \$4,360. This is more than \$500 over the entire judgment in foreclosure, including interest and costs up to the time of the judgment. This was all the evidence introduced upon the question of the value of the premises, and I think that the plaintiff's evidence in this respect was clearly refuted by that of the defendants.

The only evidence of waste or act of omission of duty in this respect on the part of Cady was that of one witness for plaintiff, who gave details tending to show that the dwelling house needed repairs to the amount of \$400; but no other one of plaintiff's witnesses

testified to any such fact, and this testimony is squarely refuted by five of defendants' witnesses. I am not willing to take his testimony alone as outweighing that of all of the others. It certainly does not, in my mind, justify the appointment of a receiver, where the rule is, in such case, that the injury or impairment of the security must be imminent. *Union Mut. Life Ins. Co. v. Union Mills Plaster Co.*, 37 Fed. 286.

I now come to the consideration of the question that the premises were the homestead of the defendant Cady, which he was occupying as such, and whether a stricter rule should not be applied in the appointment of a receiver to take possession of such property, and apply the income, rents and profits thereof towards the payment of the mortgage debt. This question is one of great importance, and, if a receiver can thus be appointed, it will greatly disturb, if not substantially destroy, the homesteads of thousands of people, especially in our cities and villages, where the use of homesteads, and rental therefrom, often constitute part of the income, and frequently the only income, for the support of the family itself.

As I have stated, the appointment of a receiver is a drastic measure, and to permit it to be used to oust a man and his family from their home, and to sequester the income, rental and profits thereof, is to deprive them of all the benefits of a homestead in a most summary manner. It certainly is a most extraordinary proceeding which authorizes such a step. Waples, in his work on Homestead at page 720, says:

"It is questionable whether it is ever proper to take possession of a mortgagor's homestead while proceedings to foreclose are pending. Certainly it is not proper practice as a general rule. An application for such an appointment should always be refused when the amount of the mortgage debt is a subject of contention in the case."

Of course I do not overlook the doctrine laid down by this court in the case of *Lowell v. Doe*, 44 Minn. 144, 46 N. W. 297, where it was held that the homestead rights of the mortgagors are subject to the ordinary legal and equitable rights of the mortgagees in respect to the mortgaged premises, which may be enforced by the appropriate remedies; citing *G. S. 1878, c. 68, § 2 (G. S. 1894, § 5522)*,

which provides that the homestead exemption shall not extend to any mortgage thereon lawfully obtained.

But the homestead law looks with favor upon homesteads, for the good of society and for the protection of family life in all classes, and seeks to save them from the rapacity of creditors, and from destruction, so far as it can without injustice to others. The reasons for this are many and cogent. To this end, I think that all steps to deprive the owner of a homestead of the right of himself and family to occupy and receive the benefits of it, during foreclosure of a mortgage upon it, should not be permitted, or should be resorted to in extreme cases only, and where justice would be defeated by withholding it, and only in cases reasonably clear and free from doubt. This is not such a case.

It is a notorious fact that in many instances the receiver, in the performance of what he claims to be his duty, incurs large expenses, greatly lessening the assets which should go to the payment of the debt itself, and this operates to the detriment of both parties to the action. In other words, the benefit to the owner of the homestead and his family, as a home and support, might be appropriated to the support of the receiver, by way of fees and expenses, with loss to both parties to the action. Our statute provides that,

"A mortgage of real property is not to be deemed a conveyance, so as to enable the owner of the mortgage to recover possession of the real property without a foreclosure." G. S. 1894, § 5861.

This is an express statutory enactment, so far as possession is concerned, and the owner of the mortgage is prohibited from taking possession of the property without foreclosure. Of course, this means that no right of possession arises until the period of redemption expires, viz., one year after foreclosure.

If possession of land is wrongfully withheld after foreclosure, and after final decree, the court may then compel delivery of possession to the party entitled thereto, by order directing the sheriff to effect such delivery. *Id.* § 6072. Thus, by clear and express statutory provisions, means are provided for obtaining possession of lands upon which mortgages are foreclosed. But until such time the mortgagee has no title, and no right of possession.

It is true that, notwithstanding the law expressly exempts a homestead, G. S. 1894, § 5522, provides that,

"Such exemption shall not extend to any mortgage thereon lawfully obtained";

But this provision does not operate to deprive the owner of the right to the possession of the homestead during the period of redemption from foreclosure sale.

The appointment of a receiver is purely of equitable origin; and whether it can, in the case of a homestead, supersede the express statutory enactment which forbids possession by the owner of the mortgage during foreclosure, may well admit of serious doubt. Equity is not intended to operate harshly, but a doctrine which permits a receiver, upon the commencement of a foreclosure action, to take immediate possession of the homestead, oust the family and receive the rents and income of the property, seems an unjust and harsh measure. Such a right is denied in *American v. Farrar*, 87 Iowa, 437, 54 N. W. 361, upon the ground that it is a violation of the statutory rights of the mortgagor, even in a case not involving homestead rights. See also cases cited in 2 Jones, Mort. § 1522.

But even if the power exists to appoint a receiver to oust the owner of a homestead and his family, take possession of the property, deprive them of the use and benefits thereof, and thus cut short the statutory right of redemption, I think the facts in this case fall far short of making this an extraordinary case which justifies such an extraordinary remedy, and that the receiver ought not to have been appointed.

I think that the judgment should be reversed.

WILLIAM A. MATHER v. JOHN J. CURLEY.

January 11, 1899.

Nos. 11,286—(172).

75	248
182	201

Tax Sale—Defective Notice of Expiration of Time for Redemption.

A notice of expiration of redemption from a tax sale stated "that the time allowed by law for redemption from said sale will have expired after sixty days have elapsed after service of this notice has been made, and proof thereof, and of the sheriff's fees, has been filed in this [the county auditor's] office." *Held*, the notice does not comply with G. S. 1894, § 1654, and is void.

From an order of the district court for Hennepin county, Simpson, J., denying a new trial, plaintiff appealed. **Affirmed.**

Benton & Molyneaux and *S. A. Reed*, for appellant.

A. T. Ankeny, for respondent.

CANTY, J.

This is an action to determine adverse claims to real estate. The trial court found for defendant, and plaintiff appeals from an order denying a new trial.

The notice of expiration of redemption from the tax sale stated,

"That the time allowed by law for redemption from said sale will have expired after sixty days have elapsed after service of this notice has been made, and proof thereof, and of the sheriff's fees, has been filed in this [the county auditor's] office."

Respondent contends that this notice is void because it does not state when the time to redeem will expire, and, in our opinion, the point is well taken. The notice does not state that the time to redeem will expire at the end of the 60 days, but that it will have expired after the 60 days; that is, it will have expired some time after the end of the 60 days, but whether it is one day or one month or one year after, is not stated.

In *State v. Nord*, 73 Minn. 1, 75 N. W. 760, we held that a notice which states a longer time than the statutory period is void, as well as one which states a shorter time. See *Peterson v. P. P. Mast & Co.*, 61 Minn. 118, 63 N. W. 168. But it seems to us that no

time at all is stated in this notice. It amounts to a statement that the time to redeem will not expire for at least 60 days. Then we are of the opinion that the notice is void.

It is true, as claimed by appellant, that the court below did not dispose of the case on this point. But it is, in our opinion, the most clear and satisfactory point on which to dispose of it. It was not, as appellant contends, necessary for defendant to appeal in order to raise this point. He is entitled to raise any point which shows conclusively that, on the findings of fact, he is entitled to judgment. Order affirmed.

CAROLINE S. TERRY v. JOHN D. MORAN and Others.

January 11, 1899.

Nos. 11,293—(203).

75 249
180 82

Priority of Mortgage—Principal and Agent—Finding Sustained by Evidence.

Two mortgages on the same land, but each to a different mortgagee, were dated the same day, executed and recorded at the same time, and both mortgagees were represented by the same agent. *Held*, on the evidence, the court did not err in finding that the mortgages were co-ordinate, and in refusing to find that one mortgagee, through such agent, promised the other that the latter's mortgage should be prior.

Action in the district court for Ramsey county to foreclose a mortgage and to have the lien of it declared superior to the mortgage of Frances A. Mead. The cause was tried before O. B. Lewis, J., without a jury, who ordered judgment in favor of plaintiff and of Frances A. Mead for the foreclosure of their mortgages respectively. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

William G. White, for appellant.

Warren H. Mead, for respondents.

CANTY, J.

Plaintiff brought this action to foreclose a mortgage held by her on a certain parcel of land in St. Paul. On the trial the court found

that plaintiff's mortgage and another mortgage held by defendant Frances A. Mead are co-ordinate and of equal priority. Plaintiff appeals from an order denying a new trial.

The only error complained of by appellant is the failure of the court to find that her mortgage is superior to the Mead mortgage. In 1883, Frances A. Mead was the owner of the land, and conveyed it to one Collins for the consideration of \$3,000. He paid her \$500 in cash, and executed to her a mortgage for \$2,500 to secure the balance of the purchase price.

Nearly five years afterwards plaintiff loaned Collins \$600, receiving as security for the loan a second mortgage on the land. Three months later plaintiff loaned him \$2,500, and he executed to her another mortgage on this land to secure the repayment of the same. The defendant Warren H. Mead acted for her in making these loans, and made them out of her money, which he had in his hands to loan for her according to his best judgment. When he made the latter loan, he applied \$1,200 of the money so loaned as a part payment on the mortgage of his wife, Frances A., who at the same time executed to Collins a release of her mortgage, and received from him a new mortgage on the same land for \$1,200, the balance due her. This new mortgage for \$1,200 and plaintiff's mortgage for \$2,500 were both dated the same day, and were executed and recorded at the same time, the former mortgage receiving the register No. 66,072, and the latter register No. 66,073.

Subsequently plaintiff, acting through her attorney, Warren H. Mead, foreclosed both of her mortgages under the powers of sale contained therein. Before the year to redeem expired, Collins conveyed the land to defendant Moran, who redeemed from both foreclosures by executing to plaintiff a new mortgage on the land for \$3,400. At the same time Frances A. Mead executed a release of her mortgage for \$1,200, and received from Moran a new mortgage on the land for the same amount. Those last two mortgages were also dated, executed, and recorded at the same time, plaintiff's mortgage receiving the prior register number.

Warren H. Mead acted also as the agent of his wife. She stipulated on the trial that he "was her agent, authorized to conduct and carry forward the transactions on her behalf."

Plaintiff knew that Frances A. Mead held the mortgage for \$1,200; but the evidence tends strongly to prove that Warren H. Mead had always represented to plaintiff that her mortgage for \$2,500 should be and was prior to his wife's mortgage. But we cannot hold that the evidence is conclusively in plaintiff's favor on this point.

The evidence also tends strongly to prove that he committed a gross error of judgment or a gross breach of duty in loaning the \$2,500 for plaintiff on this land without having his wife's mortgage wholly satisfied or made subsequent to plaintiff's mortgage. But his wife is not responsible for his failure to perform his duty to plaintiff as her agent in any of these respects, and his wife is not estopped by reason of such failure.

The order appealed from is therefore affirmed.

JAMES DROHAN v. MERRILL & RING LUMBER COMPANY.

January 11, 1899.

Nos. 11,397—(121).

Authority of Agent—Contract of Employment—Reasonable Time.

Held, authority to hire a servant for defendant, in the absence of restrictive words as to the length of the time of hiring, authorized the agent to hire a servant for such a length of time as would, under all the circumstances, be reasonable, considering the nature of the business, the season of the year in which it is prosecuted, and the length of time which it is likely to take to complete the work.

Same.

Under the circumstances of this case, it cannot be held, as a question of law, that three months was an unreasonable length of time for which to hire the servant.

From an order of the municipal court of Duluth, Edson, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$103, defendant appealed. Affirmed.

Daniel Waite, for appellant.

Chester McKusick and *John C. Hessian*, for respondent.

CANTY, J.

Plaintiff, in his complaint herein, alleges that he and the defendant corporation entered into a contract whereby it employed him as "blacksmith and handy man" in its lumber camp for three months from and after December 15, 1897, at the wages of \$45 per month; that he entered upon his duties, and, after he had discharged the same for 14 days, defendant discharged him without cause, and refused longer to employ him; and that during the balance of the three months he earned \$32, and no more. He brought this action to recover the amount of the balance of the wages for the three months as damages for the breach of the contract. On the trial he had a verdict, and defendant appeals from an order denying a new trial.

Plaintiff was employed through an employment agent, and appellant contends that the agent did not have authority to employ plaintiff for three months, or for any other definite length of time. We cannot so hold.

The testimony shows that appellant's foreman said to the employment agent, "Send me a blacksmith and handy man," and that the foreman authorized the agent to hire such a man at the wages of \$45 per month, but that nothing was said between the foreman and agent as to the length of time for which the man should be employed. The testimony of the agent is to the same effect. We are of the opinion that this was sufficient authority to authorize the agent to make a contract of employment for what, under all the circumstances, would be a reasonable length of time; and we are not able to say, as a question of law, that in this case three months was not a reasonable length of time.

What is a reasonable length of time will depend on the nature of the business, the time of the year in which it is usually prosecuted, and the length of time which it is likely to take to complete the work. *Williams v. Getty*, 31 Pa. St. 461.

"Authority to employ will, in the absence of restrictive words, include authority to make a complete contract definite as to the amount of compensation, terms of employment," etc. 1 Am. & Eng. Enc. (2d Ed.) 1034.

This is the only point raised having any merit, and the order appealed from is affirmed.

NICHOLAS HEINZMAN v. WINONA & ST. PETER RAILWAY
COMPANY.

January 11, 1899.

Nos. 11,442—(209).

75	253
86	363

Reservation in Deed Construed—Railroad Right of Way.

Before plaintiff purchased a certain tract of land, his grantor verbally agreed to convey to defendant a 300-foot strip across the same for a railroad right of way. An exception in the subsequent deed to plaintiff is construed, and *held* to reserve only so much of this right of way as was then actually occupied by defendant, which was a strip 100 feet wide through the middle of the same.

Action for Injunction—No Relief Asked—Legal Title Prevails.

Conceding, without deciding, that plaintiff took with notice, and holds the rest of the 300-foot strip in trust for defendant, yet, in the absence of any counterclaim for specific performance or other equitable relief, plaintiff is entitled to prevail on such legal title.

Action in the district court for Blue Earth county for an injunction restraining defendant from taking possession of a strip of land for the purposes of its right of way. The cause was tried before Severance, J., without a jury, who ordered judgment in favor of plaintiff. From the judgment entered pursuant thereto, defendant appealed. *Affirmed.*

Brown & Abbott, for appellant.

J. E. Porter and Pfau & Pfau, for respondent.

CANTY, J.

The right of way of the defendant's railroad is laid out across a certain 40 acres of land. All of this 40, except the right of way, is owned by plaintiff. For 25 years before the commencement of this action, defendant had maintained a fence on each side of its track across this 40, each fence being 50 feet from the middle of the track, thereby enclosing a strip 100 feet wide as a right of way.

Defendant, claiming that its right of way was in fact 300 feet wide,—150 feet on each side of the middle line of its tracks,—proceeded to take in and inclose, as a part of such right of way, a strip 100 feet wide along the west side of the west fence across the 40. This action was brought to enjoin it from doing so. On the trial, the court found for plaintiff, and, from the judgment entered in his favor, defendant appeals.

It appears by the evidence that some time prior to August 23, 1870, plaintiff's grantor, one Parsons, by a verbal contract, agreed to convey said 300-foot strip to defendant, who thereupon entered upon the land, and proceeded to grade its railroad across the same. On August 23, 1870, Parsons conveyed the 40 to plaintiff, but the deed contained the following reservation:

"Except so much of the above tract as is occupied by the right of way of the Winona and St. Peter Railroad as the same is now located through and on said tract."

Thereafter, on April 18, 1871, Parsons, pursuant to said verbal contract, made to defendant a deed which purports to convey to it said 300-foot strip. We are of the opinion that the above-quoted reservation in the deed to plaintiff excepted only so much of the right of way as was then actually occupied by defendant or marked out upon the land.

The reservation excepted only "so much * * * as is occupied by the right of way * * * as the same is now located through and on said tract." This does not refer to said verbal contract, but to the physical conditions which at the time actually existed on the land. The right of way extended through a tract of timber land, and the evidence tends to prove that, at the time in question, defendant had cut down the trees on a strip 100 feet wide,—50 feet on each side of the middle line of the track,—and no wider, and that the sides of this strip were bounded by well-defined lines. Then the court was warranted in finding that the exception in the deed to plaintiff reserved a strip only 100 feet wide,—50 feet on each side of the middle line of the track.

When plaintiff purchased the 40 he made no inquiry of defendant as to what its rights were. Appellant contends that, as it was in

possession at the time, plaintiff was put on inquiry as to the extent of its rights, that it was in position to enforce those rights by specific performance, and that plaintiff must be held to have purchased with notice of those rights, and subject to them. Conceding without deciding that appellant's position is correct, it does not follow that it should prevail in this action. Plaintiff, by the conveyance to him, took the legal title to all of this right of way except the middle 100-foot strip, and, if appellant's position is correct, he holds such title in trust for appellant; but it has not asked for specific performance or any equitable relief against him. In the absence of any such claim for equitable relief, he had a right to stand upon his legal title, and it must prevail.

This disposes of the case, and it is unnecessary to consider whether or not defendant's rights were cut off by the adverse possession of plaintiff.

Judgment affirmed.

BUCK, J.

I concur in the result, but I do not think that it ought to be conceded that plaintiff in any manner holds the extra 200 feet in trust for the benefit of the defendant. If any concession is to be made, it should be that plaintiff has an absolute title to the 200 feet, discharged from all claim, right or estate therein on the part of the defendant.

MARGARET K. MARTIN v. WALTER COURTNEY.

January 12, 1899.

Nos. 11,368—(206).

75	255
81	113

Malpractice—Test of Treatment—Same School of Medicine.

In an action for malpractice, a physician or surgeon is entitled to have his treatment of his patient tested by the rules and principles of the school of medicine to which he belongs.

Expert Witness—Competency Question for Court.

The question of the competency of a witness to testify as an expert is one exclusively for the court, and all the evidence as to his competency

should be received and considered by the court before permitting the witness to testify.

Verdict—Abuse of Discretion to Refuse New Trial.

In this case the preponderance of the evidence against the verdict was so great that it was an abuse of discretion not to grant a new trial, and submit the case to another jury.

Action in the district court for Crow Wing county by the administratrix of Joseph A. Martin, deceased, to recover \$5,000 for his death, alleged to have been caused through the malpractice of defendant. The cause was tried before Holland, J., and a jury, which rendered a verdict for \$1,250 in favor of plaintiff. From an order denying a motion for a new trial, defendant appealed. Reversed.

McClenahan & Mantor and How & Butler, for appellant.

The question of competency of an expert is one of fact for the court alone. *Beckett v. N. W. Masonic A. Assn.*, 67 Minn. 298, 302. The law only requires of one who holds himself out as a physician, to exercise the same skill and care as is ordinarily exercised by physicians in good standing who belong to the same school of medicine and practice. *Nelson v. Harrington*, 72 Wis. 591; *Patten v. Wiggin*, 51 Me. 594. Dr. Gray's testimony was incompetent. It does not appear that he had any experience to qualify him to testify as to allopathic rules and principles of practice. See *Soquet v. State*, 72 Wis. 659; *Boyle v. State*, 57 Wis. 472. The rule of liability in actions for malpractice is laid down in *Getchell v. Hill*, 21 Minn. 464.

F. M. Nye, for respondent.

On questions of science or skill, or relating to some art or trade, persons instructed therein by study or experience may give their opinion. *Lawson, Exp. Op. Ev.* 2. See also *Sneda v. Libera*, 65 Minn. 337; *Sowers v. Dukes*, 8 Minn. 6 (23). An expert may be qualified by study without practice, or by practice without study. *Lawson, Exp. Op. Ev.* 210, 211. The law does not recognize, to the exclusion of others, any particular school of medicine or class of medical practitioners. *Id.* 115, et seq. See also *Id.* 236, et seq.; *Sneda v. Libera*, supra; *Beckett v. N. W. Masonic A. Assn.*, 67

Minn. 298; Peterson v. Johnson-Wentworth Co., 70 Minn. 538; Stevens v. City of Minneapolis, 42 Minn. 136; Olson v. Gjertsen, 42 Minn. 407.

MITCHELL, J.

The defendant is a physician and surgeon, who has been for a number of years in charge of the Northern Pacific Sanitarium or Hospital at Brainerd, in the capacity of chief surgeon. This action was brought for alleged malpractice, causing the death of plaintiff's husband.

On May 24, 1895, the deceased, an employee of the Northern Pacific Railroad Company, had the toes of one foot crushed by a car wheel running over them. The injured parts were amputated at Superior, Wisconsin, and the next day he was brought to Brainerd, and placed in the hospital, under the treatment of the defendant, where he remained until July 16. During that time his wound healed gradually, but very slowly, indicating that he had a low degree of power to resist or throw off disease.

By the date last named the wound had all healed, except a small spot about the size of the end of an ordinary lead pencil. The defendant then advised the deceased to leave the hospital, and return to his home, which was in Brainerd, but to come to the hospital every day or two to have his foot examined and treated. The deceased followed this advice. The defendant, removing all the other dressings, put some collodium on the spot which had not healed, and a gauze sock on his foot. The evidence does not show the character of this gauze, but some things crop out which seem to imply that it was iodoform gauze. The deceased then went to his home, where he stayed during the remainder of the summer, but going to the hospital periodically, as directed, to have his foot examined and treated.

For a time the wound seemed to be healing satisfactorily, but about the middle of September it gave signs of breaking out again, and the foot assumed a somewhat reddish color almost up to the ankle, indicating, as we think the evidence tended to show, that the wound was in a somewhat septic condition, and that the foot was more or less infected as far as the reddish appearance extend-

ed; but defendant testified that he believed and thought that the reddish appearance was a slight irritation of the skin, caused by the iodoform gauze used in dressing.

On September 16, upon the advice of the defendant, he returned to the hospital, where another operation was performed by amputating an additional quarter of an inch of the foot. The patient, however, gradually grew worse, and finally died of sepsis, or blood poisoning, on October 23, the disease spreading very rapidly towards the last.

Speaking generally, the only respects in which the defendant's treatment is complained of are: First, that when the deceased left the hospital, in July, and thereafter, the wound was not sufficiently protected from infection by septic germs; and, second, that the second amputation should have been made at the ankle, so as to remove the entire infected district.

Upon the trial the plaintiff was called as a witness in her own behalf, and testified as to the conditions and symptoms which her husband exhibited from time to time while under the care of the defendant, and as to the course of treatment followed by the defendant and his assistant. The plaintiff then called Dr. Camp, a physician and surgeon, who knew the deceased in his lifetime, and had seen him in his last sickness; but he—evidently to the surprise of counsel—fully approved of defendant's treatment as correct and proper.

The plaintiff next called as an expert witness Dr. Gray, a physician and surgeon belonging to what is known as the homeopathic school of medicine, and proposed to have him give his opinion, based upon the plaintiff's testimony, whether defendant's treatment of the case was proper. Defendant belongs to what is known as the allopathic or regular school of medicine, and was entitled to have his treatment tested by the rules and principles of that school, and not of some other school. *Nelson v. Harrington*, 72 Wis. 591, 40 N. W. 228; *Patten v. Wiggin*, 51 Me. 594.

Objection having been made on this ground to the competency of Dr. Gray as an expert, he, on his preliminary examination, testified that there was a decided difference between the rules and principles of the two schools as respects the "practice of medicine," but not

as respects surgery. When inquired of as to whether the two schools differed as to their treatment of sepsis, his testimony was, as nearly as we can understand it, that they have the same rules in regard to the treatment of sepsis connected with surgery; but, where the condition of sepsis has developed a diseased condition, it becomes a question of disease, and not surgery, and in such case the rules of treatment of the two schools of medicine would be entirely different.

Upon the question of Dr. Gray's competency defendant's counsel offered to introduce other professional testimony to show that the two schools are hostile to each other in their rules as to the treatment of sepsis, even in cases connected with surgery. The court excluded this evidence, and permitted Dr. Gray to testify as an expert, saying that perhaps the offered evidence might be admitted later. We think this was error.

The question of the competency of the witness to testify as an expert was one for the court, and not for the jury, and the defendant should have been permitted to present to the court on the preliminary examination all competent evidence on the question. The competency of the witness did not depend wholly upon his knowledge or skill as a physician and surgeon, but also upon the question whether he would apply the correct rules and principles in giving his opinion as to the defendant's treatment of the deceased.

It is true that the witness testified that his "course of instruction had compassed the field of the allopathic course of study," but this would not help matters if he applied the wrong rules and principles to defendant's treatment. He may have, and probably did, give his testimony as to the propriety of this treatment upon the assumption that the rules and principles of the two schools were the same in a case of sepsis connected with surgery; but, if he was mistaken in this assumption, he would be testing defendant's treatment by a wrong standard.

2. It is also claimed that the court erred in not granting a new trial on the ground that the verdict, which was in favor of the plaintiff, was not justified by the evidence. When Dr. Gray's testimony closed, the plaintiff rested. The defendant himself and his assistant surgeon were called, and testified at great length and

with great particularity as to the history of the case, the conditions and symptoms of the deceased, and the treatment applied from the day the deceased entered the hospital until his death; and further testified that in their opinion the treatment applied was proper.

Two other medical experts—one of 17 and the other of over 22 years' experience—testified that, in their opinion, based upon testimony of the defendant and his assistant, the treatment of the case by the defendant was in all respects proper, and in accordance with the rules and principles of surgery and the practice of medicine; and they very emphatically joined issue with the opinion expressed by Dr. Gray that good surgery required that the second amputation should have been made at the ankle.

Dr. Gray, upon whose testimony the plaintiff's whole case practically rested, expressed his opinion quite positively that defendant's treatment of the case was unskillful and improper in the two respects already referred to, viz. (1) in not properly protecting the wound against infection by septic germs, and (2) in not making the second amputation at the ankle. The doctor had never seen the deceased, but based his opinion exclusively upon the testimony of the plaintiff, which, of course, was given from the standpoint of a layman. Without meaning to cast any reflection upon his skill, Dr. Gray was not a physician and surgeon of any large experience, having graduated from the medical school less than five years before the trial.

The defendant himself was a physician and surgeon of 15 years' experience, and had for several years occupied the position of chief surgeon of this hospital. He is not charged with neglect of his patient. What Dr. Gray charged him with was lack of professional judgment and skill in the treatment of the case.

Hence, excluding the testimony of defendant and his assistant, who may both be considered interested witnesses, there were three disinterested witnesses of quite large experience, who expressed the opinion (based in one instance largely upon his personal knowledge, and in the other two instances on the testimony of defendant and his assistant, who were medical men, as to the history and treatment of the case) that defendant's treatment was proper, as

against the testimony of one witness of limited experience (based entirely upon the testimony of the nonexpert plaintiff) that defendant's treatment was improper and unskillful.

Of course, evidence is to be weighed, and not measured; but here was a case where, from its very nature, the jury was compelled to rely almost exclusively upon the opinion evidence of medical experts. Expert evidence is at best very unsatisfactory, and is resorted to only from necessity; and, without intending to disparage a profession which contains so many eminent men of the highest skill and integrity, we are justified in saying that it is a matter of common knowledge that in almost every case requiring medical expert evidence witnesses can be found who will give opinions directly opposed to each other.

A physician or surgeon is not an insurer that he will effect a cure. Neither is he required to come up to the highest standard of skill known to the profession. When he accepts professional employment, he is only bound to exercise such reasonable care and skill as is usually exercised by physicians or surgeons in good standing of the same school of practice. And where any person claims a cause of action for neglect to exercise the required degree of care or skill, the burden is upon him to prove such neglect. *Getchell v. Hill*, 21 Minn. 464.

In this case perhaps the most serious charge against the defendant was in not making the second amputation at the ankle. He was required to exercise ordinary professional skill and judgment in determining what was best to be done under the circumstances. Of course, the most important thing was to save the patient's life. But conservative surgery required that as much of the foot as possible should be saved. A surgeon, under the circumstances, had to take into account the great value of a foot, especially to a laboring man. In determining where to make the amputation he would also have to take into account the degree, as well as the extent, to which the foot was infected; also the general health of the patient, and his power to throw off or resist disease; and then, in view of all these considerations, act in accordance with ordinary and reasonable professional skill.

If the defendant can be found guilty of malpractice upon the

evidence in this case, it would be unsafe for any man to practice medicine or surgery. If defendant had amputated the foot at the ankle, and the patient had survived, we undertake to say that the latter would have had a much stronger case than has this plaintiff. In such case we have no doubt that not only one, but several, expert witnesses could have been found who would have testified that the foot might have been saved, and that the amputation of it was bad surgery.

While, in view of Dr. Gray's testimony, it cannot be said that there was no evidence tending to support the verdict, yet it is so manifestly against the great preponderance of the evidence that it was an abuse of discretion not to grant a new trial, and submit the case to another jury. *Voge v. Penney*, 74 Minn. 525, 77 N. W. 422.

It is not merely a sum of money, but also the reputation of the defendant as a physician and surgeon, which is involved, and we do not think that he should stand condemned for all time as an incompetent upon the state of the evidence disclosed by the record, without at least submitting the question to one more jury of his countrymen.

Order reversed.

GEORGE J. BACKUS v. A. H. BARBER & COMPANY.

January 12, 1899.

Nos. 11,431—(221).

Verdict Sustained by Evidence.

Held, that the evidence justified the verdict.

Examination of Witness—Rulings of Court.

Certain unimportant rulings on the trial, in admitting and excluding evidence, considered and disposed of.

Action in the district court for Hennepin county to recover \$2,100 for the conversion by defendant of plaintiff's share of certain notes. The cause was tried before Lancaster, J., and a jury, which rendered a verdict in favor of plaintiff for \$885. From an

order denying a motion for a new trial, defendant appealed. Affirmed.

Clapp & Macartney, for appellant.

Alvord C. Egelston and George H. White, for respondent.

MITCHELL, J.

One Freeman undertook to build a creamery at Turon, Kansas, to be paid for in the notes of farmers who had taken stock in the creamery company. When the creamery was completed, Freeman was indebted, in addition to what he owed to local laborers, to various parties, principally for material for the building, \$3,354, according to plaintiff's contention, or \$3,780.29, according to the contention of the defendant. Among these debts was one of \$900 due to plaintiff for lumber, one of \$100 to one Mills for assistance, and \$2,250, as alleged by the plaintiff, or \$2,676.29, as claimed by the defendant, due to one Barber, defendant's assignor, for machinery furnished.

The creamery company insisted that, before it would accept the building and deliver the farmers' notes, all the creditors should furnish it with receipts in full, so that the company would be assured that the building was free from liens. At this juncture most of the parties in interest met at Turon to effect a settlement, the plaintiff being represented by Freeman, Barber by one Church, the creamery company by one Potter, and Mills being present in person. All the creditors furnished the creamery company with receipts in full, as requested. Potter, who was a local banker, discounted sufficient of the farmers' notes to pay the local laborers, and then delivered the balance of the notes, amounting to \$3,237.32, to Freeman, who indorsed and delivered them to Church, as Barber's agent and representative. The evidence tends quite strongly to prove that these notes constituted all that Freeman had with which to pay his creditors.

The principal controversy between the parties is as to the terms of the assignment under which Freeman transferred these notes to Barber. Defendant's contention is that they were transferred merely as collateral security for Barber's claim alone, while plaintiff's contention is that they were transferred under an agreement

that Barber should get them discounted, and then distribute the proceeds among all the creditors, and that, if he should be unable to get them discounted, he should distribute the notes themselves among the creditors pro rata.

Plaintiff brought this action to recover the value of his share of the notes. The verdict was in favor of the plaintiff for \$885.

1. The main question here is whether the evidence justified the verdict. If the plaintiff was entitled to recover at all, the evidence justified the amount of the verdict. The principal witnesses on the trial were Freeman and Mills for the plaintiff, and Potter and Church for the defendant. The evidence was conflicting as to the terms of the agreement under which the notes were transferred to Barber. The testimony on both sides is perhaps open to considerable criticism.

The preponderance of the evidence might seem to be in favor of the defendant's contention, but there are some things which tend to impair the credit of some of its witnesses. For example, their attempt to convey the impression that they knew nothing about Freeman's financial condition, and that they supposed he had actually paid plaintiff's claim, does not, in view of all the evidence in the case, commend itself as being altogether frank and ingenuous.

There is also one circumstance which we think is entitled to considerable weight, viz., no reason is suggested by anything in the record why Freeman should voluntarily prefer Barber to his other creditors by turning over all the notes to him, leaving the others unprovided for. We could not disturb the verdict on the ground of want of evidence to support it.

2. Certain rulings of the court in excluding or admitting evidence are assigned as error. When Mills was on the stand as a witness for the plaintiff he testified to two conversations with Church on the evening of the day on which the notes were transferred, one on the street and one on the cars. The alleged conversation on the street, as testified to, consisted merely of a statement by Church that there would be enough when the notes were discounted to settle everything. According to Mills' testimony, he made substantially the same statement on the cars. When Church

was called as a witness for the defendant he gave his version of what was said on the cars. He was asked:

"Did you at that time, or at any other time, state to him (Mills) that when those notes were discounted there would be enough to pay all the bills?"

To which he replied:

"Why, I don't remember of making any such statement;"

And then proceeded to testify as to what he did say. After his cross-examination, counsel, on redirect, proposed to examine him as to what was said on the street. This was excluded. Although the court may have given the wrong reason, there was no error in this ruling, for we think the matter had been fully covered on the original examination of the witness.

There was no reversible error in permitting the cross-examination of Potter referred to in the second assignment of error.

The evidence referred to in the third assignment of error was properly excluded, under the rule that the re-examination of a witness should be confined to matters that will develop, explain, modify or rebut any new matter brought out on the cross-examination. This rule is unfortunately so commonly disregarded and so much see-sawing permitted in the examination of witnesses, that we might hesitate to sustain the ruling of the trial court, if the proposed examination had related to any matter of special importance which had not been practically covered by other evidence in the case. But the matter sought to be inquired about would, at most, have had but a slight and indirect bearing upon the issue in the case, and had been already substantially covered by the evidence already admitted.

Moreover, a perusal of the record discloses that the court had, upon the whole, been exceedingly liberal in permitting both parties to introduce in evidence every collateral circumstance and everything in the subsequent conduct of the parties calculated to throw any light upon the terms of the agreement under which the notes were transferred to Barber.

Order affirmed.

**F. D. CRUIKSHANK v. ST. PAUL FIRE & MARINE INSURANCE
COMPANY.**

January 12, 1899.

Nos. 11,481—(260).

**Judgment notwithstanding Verdict—Laws 1895, c. 320—Practice—
New Trial.**

In extending, by Laws 1895, c. 320, the common-law remedy of judgment notwithstanding the verdict to cases where, upon the evidence, a party is entitled to judgment, it must be assumed that the legislature intended such cases to be governed by the same rule as obtained at common law where the motion was made on the record alone, and that the motion should only be granted when it clearly appears from the evidence that the cause of action or defense sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense; and that it should be denied where it appears probable that the party has a good cause of action, or a good defense, and that the defects in the evidence are of such a character that they probably could be supplied upon another trial. Where the motion after verdict is exclusively for judgment notwithstanding the verdict, and not in the alternative for that remedy or for a new trial, if the party is not entitled to judgment as requested, he is not entitled, at least as a matter of right, to a new trial.

Action in the district court for Wilkin county to recover \$1,500 upon an insurance policy. The cause was tried before C. L. Brown, J., and a jury, which rendered a verdict for \$766.25 in favor of plaintiff. From an order denying a motion to enter judgment for defendant notwithstanding the verdict for plaintiff, defendant appealed. Affirmed.

Palmer & Beek and Ezra G. Valentine, for appellant.

It is settled that where a policy requires notice of loss to be given to the insurer within a specified time, such notice is a condition precedent to the right of action on the policy. *Ermentrout v. Girard Fire & Marine Ins. Co.*, 63 Minn. 305; *Bowlin v. Hekla Fire Ins. Co.*, 36 Minn. 433; *Shapiro v. Western Home Ins. Co.*, 51 Minn. 239; *Shapiro v. St. Paul Fire & M. Ins. Co.*, 61 Minn. 135.

75	266
177	443
75	266
178	230
75	266
179	19
75	266
80	73
80	213
80	214
75	266
81	2
181	113
81	183
75	266
84	316
84	317
84	402
75	266
d85	392
d85	396
75	266
86	97

Lyman B. Everdell and Mathews & Wood, for respondent.

In the absence of statutory authority the appellate court will not order judgment non obstante veredicto. *Stewart v. Everts*, 76 Wis. 35. The rendition of such a judgment by the trial court rests in its sound discretion. 11 Enc. Pl. & Pr. 920. It is never granted, except when it is clear that the party asking it is justly entitled to it; and, when asked for by the defendant, that the plaintiff has no legal cause of action. *Id.* 919; *Williams v. Anderson*, 9 Minn. 39 (50); *Lough v. Thornton*, 17 Minn. 230 (253).

MITCHELL, J.

This was an action to recover upon a "hail insurance policy," one provision of which was that,

"In case of loss by hail to the crops insured, the assured shall mail a written notice to the company at its office in the city of St. Paul, Minn., within forty-eight hours after the time of such loss, stating the day and hour of the storm, also the probable damage to each part of the crops insured."

So far as material for the purposes of this appeal, the defense was that the insured had not given notice of loss in accordance with this provision of the policy.

The policy contained a warranty that the insured was the owner of all the land upon which the crops covered by the policy were growing, but a breach of this warranty, if any, was a matter of defense, and no such defense was pleaded.

When the evidence closed the defendant moved the court to direct a verdict in its favor, but the court denied the motion and submitted the case to the jury, which found a verdict in favor of the plaintiff. Thereupon the defendant made a motion, not in the alternative for judgment notwithstanding the verdict, or, in case that should be denied, for a new trial, but merely for judgment notwithstanding the verdict. The court denied the motion, and from the judgment entered upon the verdict the defendant appealed.

Originally at common law, judgment notwithstanding the verdict could only be granted in favor of the plaintiff, the remedy in favor of the defendant being to have the judgment arrested; but either by statute or by judicial relaxation of this rule, judgment not-

withstanding the verdict became quite generally allowable in favor of either party. But in either case the motion was based on the record alone, and the granting or denying it depended upon the pleadings. The rendition of judgment notwithstanding the verdict was discretionary with the court. It would only be granted when it was clear that the cause of action, or the defense, put upon the record did not, in point of substance, constitute a legal cause of action or defense. It was never granted on account of any technical defect in the pleadings, but in such case the court would order a repleader.

By enacting Laws 1895, c. 320, the legislature was not creating a new remedy, but merely extended, as has been done in many other states, the common-law remedy to cases where, upon the evidence, either party was clearly entitled to judgment. In thus extending the remedy it must be presumed that the legislature intended it to be governed by the same rules which applied when it was granted upon the record alone; that is, that it should not be granted unless it clearly appeared from the whole evidence that the cause of action, or defense, sought to be established could not, in point of substance, constitute a legal cause of action or a legal defense.

This court has acted on this construction of the statute and refused to order judgment even where there was a total absence of evidence on some material point, but where it appeared probable that the party had a good cause of action or defense, and that the defect in the evidence could be supplied on another trial. This is just such a case.

From the record it appears probable that the plaintiff has a good cause of action and that the defects, if any, in the evidence, are largely technical and could be supplied on another trial. The alleged defects in the evidence suggested are of the following character: that the letter from plaintiff's father to Kenaston was not formally introduced in evidence, that there was no evidence that the letter from Kenaston to the defendant was ever mailed, and that there was no evidence that the person who came to adjust the loss was McClure, or that McClure was at that time defendant's adjuster.

The statute permits a party to make his motion in the alternative.

Defendant has elected not to do so, but to stand exclusively on its right to judgment in its favor notwithstanding the verdict against it. Not being entitled to this relief, it is not entitled, at least as a matter of right, to a new trial on the ground of the insufficiency of the evidence. Indeed, counsel for the defendant conceded this upon the argument.

Judgment affirmed.

GEORGE WARD v. JANE T. WARD.

January 17, 1899.

Nos. 11,022—(200).

75	269
d86	298
e86	299

Sunday—Judicial Proceedings Forbidden.

By the common law all judicial proceedings on Sunday were forbidden. Any other business could lawfully be transacted.

G. S. 1878, c. 100, § 20, Repealed by Penal Code.

G. S. 1878, c. 100, § 20, which in terms prohibited all manner of labor, business or work upon Sunday, except works of necessity and charity, was expressly repealed on the adoption of the penal code in 1886 (G. S. 1894, § 6851).

G. S. 1894, § 6517—Private Contracts not Forbidden.

The present law (G. S. 1894, § 6517) simply prohibits all manner of public selling and offering for sale publicly of property upon Sunday, except certain specified articles. The statutory prohibition does not cover or affect contracts or casual sales made privately, and it was not designed to forbid business transactions which are privately conducted. Such sales are legal, and may be enforced.

Statute of Frauds—Delivery and Acceptance—Finding Sustained by Evidence.

Held, that the evidence produced upon the trial of this action, which was brought to recover the alleged value of certain farm products sold in separate lots or parcels, each of a value of more than \$50, was sufficient to sustain a finding that subsequent to the alleged sale the property was delivered to defendant, and received and accepted by her as her own, and thus to satisfy the statute of frauds.

Charge to Jury Erroneous.

Held, for reasons given in the opinion, that the court erred in its

charge when stating that the defendant admitted a certain matter which was in dispute, for which error a new trial must be had.

From an order of the district court for Hennepin county, Smith, J., denying a motion for a new trial, defendant appealed. Reversed.

Savage & Purdy, for appellant.

To constitute a delivery and acceptance of goods, within the meaning of the exceptions in the statute of frauds, something more than words is necessary. There must be some act amounting to a transfer of the possession and an acceptance thereof by the buyer. *Shindler v. Houston*, 1 N. Y. 261; *Brabin v. Hyde*, 32 N. Y. 519; *Rodgers v. Phillips*, 40 N. Y. 519; *Caulkins v. Hellman*, 47 N. Y. 449; *Stone v. Browning*, 51 N. Y. 211, 68 N. Y. 598; *Good v. Curtiss*, 31 How. Pr. 4; *Ham v. Van Orden*, 4 Hun, 709; *Denny v. Williams*, 5 Allen, 1; *Remick v. Sandford*, 120 Mass. 309. This is to be proved by the party setting up the contract. *Remick v. Sandford*, *supra*; *Taylor v. Mueller*, 30 Minn. 343.

A contract void because made on Sunday cannot be ratified, nor can a recovery be had thereon without a new contract. *Allen v. Deming*, 14 N. H. 133; *Day v. McAllister*, 15 Gray, 433; *Vinz v. Beatty*, 61 Wis. 645; *Plaisted v. Palmer*, 63 Me. 576; *Shelton v. Marshall*, 16 Tex. 344; *Negley v. Lindsay*, 67 Pa. St. 217. See also *Aspell v. Hosbein*, 98 Mich. 117; *Winfield v. Dodge*, 45 Mich. 355. There must be an express subsequent contract. *Bradley v. Rea*, 14 Allen, 20, 103 Mass. 188; *Reeves v. Butcher*, 31 N. J. L. 224; *Perkins v. Jones*, 26 Ind. 499; *McIntosh v. Lee*, 57 Iowa, 356; *Gwinn v. Simes*, 61 Mo. 335.

The following contracts and instruments executed on Sunday have been declared void under the Sunday violation acts of the respective states in which the decisions were rendered: A replevin bond: *Link v. Clemmens*, 7 Blackf. 479. A deed: *Love v. Wells*, 25 Ind. 503. A sale of goods: *Perkins v. Jones*, 26 Ind. 499. A promissory note: *Sayre v. Wheeler*, 31 Iowa, 112, 32 Iowa, 559; *Clough v. Goggins*, 40 Iowa, 325; *Tucker v. West*, 29 Ark. 386; *Reynolds v. Stevenson*, 4 Ind. 619. Hiring a horse: *Stewart v. Davis*, 31 Ark. 518. An offer to rescind a sale: *Merritt v. Robinson*, 35 Ark. 483.

Selling tickets for a public entertainment: *Quarles v. State*, 55 Ark. 10; *Hill v. Hite*, 79 Fed. 826, 85 Fed. 268. Any contract: *Johnson v. Brown*, 13 Kan. 529; *Birks v. French*, 21 Kan. 238.

Any erroneous assumption of material facts by the court in charging the jury is reversible error. 11 Am. & Eng. Enc. 254; *Gaither v. Martin*, 3 Md. 146; *Sherman v. Dutch*, 16 Ill. 283; *Peck v. Ritchey*, 66 Mo. 114; *Kinney v. Williams*, 1 Colo. 191; *Railroad Co. v. Gladmon*, 15 Wall. 401; *Smith v. Dukes*, 5 Minn. 301 (373); *Schwartz v. Germania Life Ins. Co.*, 21 Minn. 215; *Siebert v. Leonard*, 21 Minn. 442.

George R. Robinson, for respondent.

A contract of sale made on Sunday, but not completed by delivery until a subsequent day, is not a contract within the statute of frauds. *State v. Young*, 23 Minn. 551; *Schwab v. Rigby*, 38 Minn. 395; 1 Wharton, Cont. § 382; *Benjamin, Sales*, § 577; *Smith v. Bean*, 15 N. H. 577; *Merrill v. Downs*, 41 N. H. 72; *Mason v. Thompson*, 18 Pick. 305; *Rosenblatt v. Townsley*, 73 Mo. 536.

COLLINS, J.

Action to recover the reasonable value of certain goods, wares and merchandise alleged to have been sold and delivered by plaintiff to defendant, of the value of \$1,064.40. Plaintiff had a verdict for \$439.86.

According to the bill of particulars, these articles were sold in three separate lots or parcels,—one upon December 2, 1894, which was Sunday; another upon January 20 following, which was also Sunday; and the third upon April 7 following. Each of these lots or parcels was of a value exceeding \$50; all of the sales were made verbally, if at all; none of the articles were delivered at the time, and no part of the purchase price was then, or subsequently, paid.

1. There is no merit whatever in defendant's assignment of error in respect to the second bill of particulars, and it need not be discussed.

2. Conceding that each of these sales was void under the statute of frauds, the evidence, in regard to a subsequent delivery to defendant and that she received and accepted the articles specified in the bill of particulars as her own and unconditionally, was suffi-

cient to justify the verdict. The articles in question were ground feed, corn, oats, hay, some beef, a hog, a cow, a heifer and a horse.

Both parties resided on farms not far apart, and defendant carried on a dairy business. Some of these articles were delivered by plaintiff on defendant's farm and with her knowledge, while one of her servants went to plaintiff's farm, and hauled away other articles; all of which went upon and were used on her farm.

There was no dispute over a delivery of the horse by plaintiff to a young man by the name of Allen, who had resided in defendant's family from boyhood, but the controversy was as to its ownership and who turned it over to Allen. Plaintiff's contention was that he owned the animal, and that defendant bought it of him with directions to deliver it to Allen; while defendant contended that her husband, plaintiff's father, to whom she had recently been married, owned the horse, and turned it over to Allen in part payment of her debt. That Allen received the horse on account of defendant's indebtedness to him was undisputed, and, if the jury believed the plaintiff's testimony on this branch of the case, they were warranted in finding that the horse was delivered to Allen on defendant's order.

As before stated, we are of the opinion that the acts and course of conduct on defendant's part sufficiently showed her intention to receive the goods in performance of the verbal agreement, and to appropriate them as her own, and unconditionally. This satisfied the statute.

3. We have no occasion to examine either the charge of the court as to the subsequent ratification and validation of a Sunday contract for the sale of personal property by a delivery and acceptance thereof, or the requests to charge on this subject submitted by defendant's counsel, and rejected and refused by the trial court. All controversy arising out of the fact that two of the sales, all of which were at plaintiff's farm, were made on Sunday, grew out of a misapprehension as to the present condition of the statutes of this state in regard to the observance of Sunday.

Prior to the adoption of the penal code, which took effect January 1, 1886, G. S. 1878, c. 100, § 20, was in force, and the earlier decisions of this court were based upon that section, which, in unequivocal

language, prohibited all manner of labor, business or work upon Sunday, except works of necessity and charity, and made a violation of these provisions a misdemeanor punishable by fine. This section was construed as similar sections had been elsewhere. But it was expressly repealed by the penal code (G. S. 1894, § 6851), and the nearest approach to it is section 6517. This prohibits all manner of public selling and offering for sale of any property upon Sunday, excepting articles of food, to be sold and supplied before 10 o'clock in the morning, and certain other articles, which may be sold in a quiet and orderly manner at any time of the day. There is no inhibition in the statute upon a private casual sale, as were those now in dispute, and consequently the decisions of this court based upon a former statute, or of other courts in states where statutes of the same import prevail, are not at all pertinent.

By the common law all judicial proceedings on Sunday were forbidden, but any other business could lawfully be transacted. We are therefore governed wholly by the present statute and must dispose of the question without reference to decisions which were founded upon a statute now repealed. Section 6517 was taken bodily from the New York Penal Code, where it is now found as section 267. In that state this section, practically in its present form, seems to have superseded, in 1865 (1 R. S. p. 676, § 71), an old enactment by which it was provided that "no person shall expose for sale any wares, merchandise," etc., on Sunday; and in 1835 it was held, in *Boynton v. Page*, 13 Wend. 425, that this prohibition extended only to the public exposure of commodities to sale in streets, stores, shops and like public places, and had no reference to mere private contracts made without violating, or tending to produce a violation of, the public order and solemnity of the day.

After considerable examination of the New York Reports, we are unable to find a case in which the language found in the penal code of that state, and used in our section 6517, *supra*, has been construed. It is very clear, however, that no doubt can exist as to the interpretation to be put upon it. It is capable of but one construction, and simply means what it so distinctly says. Public selling

and offering for sale publicly of any kind of property, except as specified, upon Sunday, is prohibited. He who violates this law is guilty of a misdemeanor punishable by a fine, and known as Sabbath breaking. Section 6519. The prohibition extends to public sales and publicly offering for sale only.

The statute does not cover or affect contracts or casual sales made privately, and without violating, or tending to produce a violation of, the public order and solemnity of the day. It was not designed to forbid business transactions which in no manner affect the rights of others who are properly observing the day. There is no real difference between section 6517 and the statute construed in the Boynton case, *supra*. The sales in question were not prohibited by the statute.

4. We have stated the claims made by each of these parties as to the horse. In its charge to the jury the court referred to this portion of the case, and, speaking of the Sunday contract, said, concerning the horse:

"And if you find that this property was delivered at a subsequent time to the defendant, and she accepted it, and converted it to her own use, *and used it, as has been admitted by the defendant that she used it, in payment of her debt*, then the fact that it is a contract made on Sunday would not destroy the validity of it."

A special exception was taken to the language above italicised, and it is urged that this was a rank misstatement of the testimony. It certainly was. The defendant nowhere admitted that she used the horse in payment of her debt. She did admit that the horse was turned over by her husband in part payment of a debt she owed Allen, but expressly denied that she had anything to do with this transaction except to consent to it when informed that her husband stood ready to use his own property in part payment of his wife's debt, and to give his note for the balance of the indebtedness, which was done.

While, under our construction of section 6517, this instruction may not have been error which would compel a reversal if the Sunday question had been the only one in the case, it was calculated to influence the jury improperly when considering the question of de-

livery in connection with the statute of frauds. For this reason a new trial must be had.

5. Other assignments of error need no consideration.

Order reversed and a new trial ordered.

WEST DULUTH LAND COMPANY v. HENRY L. BRADLEY and Others.

January 17, 1899.

Nos. 11,295—(192).

Judgment by Default—Collateral Attack—Failure to File Promissory Note with Clerk.

In a collateral attack upon a judgment entered by default, in an action brought upon a promissory note, it is immaterial that the note was not filed with the clerk when the judgment was entered. At most, the omission is a mere irregularity.

Execution against Two Persons—Joint and Separate Property.

Under an execution in which an officer is commanded to satisfy the same out of the property of A. and B., judgment debtors, he may seize and sell the separate property of either or the joint property of both.

Bradley v. Sandilands Followed.

The decision in *Bradley v. Sandilands*, 66 Minn. 40, adhered to.

From an order of the district court for St. Louis county, Moer, J., denying a motion for a new trial, defendants appealed. Affirmed.

H. S. Lord, for appellants.

McCordic & Crosby, for respondent.

COLLINS, J.

This was an action to determine adverse claims to vacant and unoccupied lands. Defendants answered, asserting title in themselves, and a trial resulted in a conclusion of law directing judgment for plaintiff. This appeal is from an order denying defendants' motion for a new trial.

1. The plaintiff's title to the property depends upon the validity of the execution sale in controversy, and passed upon, in *Bradley v. Sandilands*, 66 Minn. 40, 68 N. W. 321. We there held the sale valid. The defendants' claim of title here rests, as did the plain-

tiffs' in that case, upon the contention that the sale was wholly unauthorized and invalid, and that purchasers thereat failed to acquire title to the property sold. And the counsel who therein appeared for the plaintiffs, appears in this action for defendants and, with a very exhaustive brief in which the ground is again gone over, urges us to reconsider our former decision, and to overrule the conclusions then reached as to the original judgment and the execution upon which the sale was based. This we decline to do. As to the points therein decided we are content, and they were disposed of adversely to the present defendants' contention.

2. It is of no consequence in this collateral attack upon the judgment that the note sued upon does not affirmatively appear to have been filed with the clerk when the default judgment was entered. The omission, if any, did not affect the jurisdiction of the court over the person of the defendants. At most it was a mere irregularity.

3. It is argued that under the execution, which directed the sheriff to levy upon the property of the judgment debtors, legal levy could not be made upon the separate property of either debtor, but that the levy and sale could only be of their joint property. The recital in the sheriff's certificate of sale, that the property seized and sold was that of the debtor Catherine Ely, is the only thing in the record which tends to show that the separate property of one, instead of the joint property of both debtors, was levied upon. But the fact, if it be one, that the property in question belonged solely to one of the debtors is immaterial.

It is the universal practice to issue executions against two or more joint debtors in the form here followed, connecting them conjunctively, and not disjunctively. Under an execution in which an officer is commanded to satisfy the same out of the property of A. and B., judgment debtors, he may seize and sell the separate property of either or the joint property of both. See 8 Enc. Pl. & Pr. p. 422, and cases cited. This disposes of the case.

Order affirmed.

JOHN B. ATWATER v. A. STROMBERG.

January 17, 1899.

Nos. 11,346—(207).

Promissory Note—Consideration—Issue of Stock in National Bank.

Held, on the facts stated in an action brought by the receiver of a national bank upon a promissory note executed and delivered by defendant to such bank, when it was a going concern, in consideration of the issuance and delivery to defendant by the bank of its certificate for certain stock shares therein, that there was no want of consideration for the execution and delivery of the note.

Same—Action by Receiver—Secret Agreement no Defense.

And after the bank has become insolvent, and the rights of creditors have become vested, such defendant cannot set up as a defense to an action by the receiver on the note a secret agreement with the president of the bank that he should have the option of surrendering the stock when the note matured, and having it returned.

Action in the district court for Hennepin county by the receiver of the Columbia National Bank, insolvent. From an order denying a motion for a new trial, Simpson, J., after ordering judgment in favor of plaintiff, defendant appealed. Affirmed.

Weed Munro, for appellant.

A. G. Braden, J. B. Atwater and E. C. Garrigues, for respondent.

COLLINS, J.

Action upon a promissory note for \$700 executed and delivered by defendant to a national bank when it was a going concern. Before the note matured the bank suspended business, and plaintiff was thereupon appointed its receiver by the comptroller of the currency of the United States. At the time of the execution and delivery of the note the bank issued and delivered to defendant its certificate for seven shares of its capital stock, of the par value of \$100 each. Concededly, there was no other consideration for the note.

Concurrently, and as part of the same transaction, the president of the bank signed and delivered to defendant a writing in which, after reciting that defendant had purchased the stock shares for

which he had given his note, it was stated that, when the note fell due, defendant, at his election, could exchange the stock shares therefor. The court also found that at the same time the bank president stated to defendant that the note was solely for the accommodation of the bank, and that he would never be called upon to pay it. On the facts as found, judgment for plaintiff receiver was ordered, and the appeal is from an order denying a new trial.

Assuming the law to be, as stated in *Scott v. Armstrong*, 146 U. S. 499, 13 Sup. Ct. 148, that the receiver

"Took the assets of the * * * bank as a mere trustee for creditors, and not for value and without notice, and, in the absence of statute to the contrary, subject to all claims and defenses that might have been interposed as against the insolvent corporation before the liens of the United States and of the general creditors attached,"

It does not follow that plaintiff cannot recover. That part of the writing which gave defendant an option to exchange his stock shares for the note was in direct conflict with the provisions of R. S. (U. S.) § 5201, which prohibits the taking or acquiring of its own stock shares by a national bank, except as it may become necessary in order to prevent loss upon a previously contracted indebtedness.

Again, when the certificate of stock shares was delivered to defendant and he became a stockholder, he knew that credit would be given to the bank upon the faith of that stock, as the law provides. When the corporation became insolvent the rights of the creditors became fixed as to all stockholders. Defendant necessarily assumed the risk that this might happen, when he took the stock. See *Dunn v. State Bank*, 59 Minn. 221, 61 N. W. 27; *Olson v. State Bank*, 67 Minn. 267, 69 N. W. 904.

If defendant can now be allowed to evade the payment of his note given for the stock shares, he might with equal propriety be permitted to deny that he became a stockholder, and thus perpetrate a fraud upon creditors. The stockholders of a corporation cannot directly or indirectly release themselves or discharge their liability as such by means of agreements with one another or with the corporation. Yet by the writing relied upon by defendant this was the very thing attempted, and, if such a transaction could be tolerated,

every stockholder in a bank could protect himself from liability or loss through the medium of a like secret agreement. The statute forbids this, and it is clearly against public policy.

Finally, this case, on principle, cannot be distinguished from that of *Atwater v. Smith*, 73 Minn. 507, 76 N. W. 253, and is controlled by it. The facts there more distinctly demonstrated the necessity of holding stockholders in a financial institution to a strict rule, but otherwise the cases are alike.

Order affirmed.

FIRST NATIONAL BANK OF BRAINERD v. JAMES C. FLYNN and
Another.

January 17, 1899.

Nos. 11,355—(226).

**Foreclosure of Mortgage—Fraud upon Wife—Finding as to Mortgagee
not Sustained by Evidence.**

At the trial of an action brought to foreclose a mortgage covering the statutory homestead of defendants (husband and wife), the court found as a fact that the wife's signature to the instrument was obtained by false and fraudulent representations made to her by her husband as to what property was therein described, and also found that the agent of plaintiff mortgagee, its representative in the transaction, knew of, and was a party to, the fraud. *Held*, that the last-mentioned finding was entirely unsupported by the evidence.

From an order of the district court for Morrison county, Searle, J., denying a motion for a new trial, plaintiff appealed. *Reversed*.

W. S. McClenahan, for appellant.

It is a general and just rule that, when a loss has happened which must fall on one of two innocent persons, it shall be borne by him who is the occasion of the loss, even without any positive fault committed by him, but more especially if there has been any carelessness on his part which caused, or contributed to, the misfortune. *Somes v. Brewer*, 2 Pick. 183, 201; *Miller v. Powers*, 119 Ind. 79. Where one of two innocent persons must suffer by the fraud or

negligence of a third, whichever of the two has accredited him ought to bear the loss. *Mundorff v. Wickersham*, 63 Pa. St. 87; *Schultz v. McLean*, 93 Cal. 329.

To charge the plaintiff with responsibility for a fraudulent understanding between its agent Chiperfield and defendant Flynn, the evidence must be clear, strong and convincing beyond a reasonable controversy, that such an understanding existed. See *Maxfield v. Schwartz*, 45 Minn. 150; *McCall v. Bushnell*, 41 Minn. 37; *Minneapolis, St. P. & S. Ste. M. Ry. Co. v. Chisholm*, 55 Minn. 374; *Oxford v. Nichols & Shepherd Co.*, 57 Minn. 206; *Lennon v. White*, 61 Minn. 150; *Howland v. Blake*, 97 U. S. 624; *Pool v. Ellison*, 56 Hun, 108; *Newton v. Holley*, 6 Wis. 564; *Condit v. Dady*, 56 Ill. App. 545; *Crookston Imp. Co. v. Marshall*, 57 Minn. 333; *Kercheval v. Doty*, 31 Wis. 476, 491.

A deliberate deed of writing is of too much solemnity to be brushed away by loose and inconclusive evidence. *Howland v. Blake*, *supra*; *Lennon v. White*, *supra*; *Maxfield v. Schwartz*, *supra*; *Albitz v. Minneapolis & P. Ry. Co.*, 40 Minn. 476; 2 Kent, Com. 484. The uncorroborated testimony of a party is not highly regarded in cases of this character. *Murphy v. Dunning*, 30 Wis. 296.

Taylor & Jenks, for respondent.

As between the original parties, one who has intentionally deceived the other to his prejudice is not to be heard to say, in defense of the charge of fraud, that the innocent party ought not to have trusted him. *Maxfield v. Schwartz*, 45 Minn. 150; *Shrimpton & Sons v. Philbrick*, 53 Minn. 366; *Gibbons v. Bente*, 51 Minn. 499; *Gardner v. Trenery*, 65 Iowa, 646; *Redding v. Wright*, 49 Minn. 322; *De May v. Roberts*, 46 Mich. 160.

When it is shown that a paper had its inception in fraud, one relying on it must show affirmatively that he is not tainted with the fraud, and that he had no knowledge of the fraud. See *Canajoharie v. Diefendorf*, 123 N. Y. 191; *Cummings v. Thompson*, 18 Minn. 228 (246); *Bank of Montreal v. Richter*, 55 Minn. 362; *Vosburgh v. Diefendorf*, 119 N. Y. 357, 360; *Giberson v. Jolley*, 120 Ind. 301; *Mace v. Kennedy*, 68 Mich. 389; *Goodrich v. McDonald*, 77 Mich. 486;

Haggland v. Stuart, 29 Neb. 69; Sullivan v. Langley, 120 Mass. 437; Stewart v. Lansing, 104 U. S. 505.

COLLINS, J.

Defendants are husband and wife, residents of Little Falls, while plaintiff's place of business is at Brainerd, 32 miles distant. At the time of the transaction hereinafter mentioned, defendant husband was the owner of a full lot, and part of another, in block 7, in said Little Falls, on which was a business block; and he was also the owner of lots 7 and 8 in block 42,—his dwelling house being upon lot 7. Both of these tracts of ground seem to have been "corners." and it appears that defendants, when speaking with each other about the business block, usually called it "our corner." This designation was sufficiently definite as between themselves, according to the evidence.

This was an action brought to foreclose a mortgage upon lots 7 and 8,—in the form of a warranty deed,—executed and delivered April 3, 1896, to plaintiff by defendants to secure the husband's indebtedness in the sum of \$2,500.

The wife alone answered, alleging that the property in question was, and for more than eight years had been, the statutory homestead of defendants, and that her signature to the deed had been obtained by means of false and fraudulent representations on the part of her husband and plaintiff's agent as to the tract of ground therein described and conveyed. The answer also contained other and sufficient averments in reference to the alleged fraud, and demanded that foreclosure of the mortgage be denied and the conveyance adjudged null and void.

At the conclusion of a trial by the court, without a jury, the findings of facts were in favor of defendant wife; and, as a conclusion of law, it was ordered that judgment be entered canceling and annulling the conveyance as to lot 7, which was found to be the homestead, and canceling and annulling it as to lot 8 in so far as it purported to convey the wife's inchoate interest therein. Personal judgment was ordered against the defendant husband for the amount of his note, and a sale of his interest in lot 8.

The court expressly found that the husband, deliberately and for

the purpose of inducing his wife to sign the deed, deceived her as to the tract of land described, by stating and representing to her in the hearing of plaintiff's agent, present for the purpose of obtaining the security, that it was the business "corner" before referred to, and that said

"Agent was present, and heard all the conversation, and made no objection thereto, and that he had full knowledge of the facts, and was a party to the deception practiced upon the defendant" wife.

Plaintiff's motion for a new trial having been denied, it appealed from the order.

It is urged by counsel for plaintiff that several of the findings of fact, and especially that above quoted, upon which the conclusion of law must have been based, are not supported by the evidence. We agree with counsel as to the quoted finding; for there is no evidence in the record tending to connect plaintiff's agent (an attorney at law by the name of Chipperfield) with the fraud upon which counsel for defendant wife plant their case.

That this may be fully demonstrated, we will detail the attending circumstances, and Mrs. Flynn's version of the transaction. As before stated, Little Falls is 32 miles from Brainerd. Chipperfield practiced law at the latter place, and seems to have been sent to Little Falls by plaintiff for the purpose of examining the title to the real estate, preparing the deed of conveyance and obtaining defendants' signatures thereto. He made the necessary examination at the court house, drew the deed and then found Mr. Flynn at the hotel, where the latter signed. They then went to Flynn's residence, on lot 7, for the purpose of obtaining Mrs. Flynn's signature, but found her absent. She was at a church making preparations for Easter services.

Chipperfield had been acquainted with Mrs. Flynn for some years, but what his acquaintance was with her husband does not appear. It was not shown that Chipperfield had ever been in Little Falls prior to this occasion or that he had any knowledge as to Flynn's business or property. In his examination of the title he may have discovered that lot 8, adjoining 7, on which was the dwelling house, was a corner lot; and this he could have easily seen when at the

house with Mr. Flynn. Both men then went to the church; Mr. Flynn having with him, as he testifies, two other papers, concerning the business corner before mentioned, to which he wished to secure his wife's signature. On reaching the church, Mrs. Flynn was called to the door, and there met the men. What then happened was related by Mrs. Flynn, when testifying, as follows:

"Our conversation at first was purely friendly, of course, when I met Mr. Chipperfield; and the papers were referred to, and the question of the ink and pen was brought up. There was no ink and no pen upstairs, and it was sent downstairs for, as I suggested. I understood that every one was in a hurry, because Mr. Chipperfield had to catch the train. The pen and ink were secured as quick as possible. We went into the vestry of the church. The papers were laid on the table before me. I asked the question, as I always did, to what property these papers referred. Mr. Flynn had done so much business in land and papers in regard to property, that I was in the habit of signing them. I had signed a good many. Mr. Flynn replied they referred to 'our corner.' I remember that distinctly. The block was often spoken of as 'our corner' or 'our block.' I took it that the papers referred to the block. I did not look them over, and considered that I did not have the time to do so; and I supposed the question that I asked, and the answer I received, was sufficient."

Questions and answers followed, thus:

"Q. What was this property that was known and designated as the 'block'? A. That block that Mr. Flynn built on the corner of Broadway and First streets. Q. The business block? A. Yes, sir; had been referred to several years, and years before the block was put up there, and afterwards, as 'our corner' or 'our block.' Q. The matters concerning that block had been somewhat complicated? A. Yes, sir; very much so. I had signed quite a number of papers, previous to that, concerning the block. Q. Was Mr. Chipperfield there during all this transaction? A. Mr. Chipperfield was present through it all. Q. Did he say anything? A. He said nothing. Q. He heard it all? A. He did, unless his hearing is defective. Q. Mr. Flynn at different times has done a large business in the matter of handling and transferring real estate? A. Yes, sir. Q. For years? A. Yes, sir. Q. You had been in the habit of signing deeds when he presented them for signature? A. Yes, sir. Q. Your information as to what the property was depended on what? A. Entirely on what I was told. I know no more about numbers of blocks than— Q. Did you know at that time the number of the lot and block on which the homestead was?

A. I did not; no, sir. Q. Did you know the number of the lot and block on which the business block was? A. No, sir. Q. Then, if you had read this deed, you would not know whether it referred to the homestead or not? A. No, sir.

On cross-examination Mrs. Flynn stated that, had she read the papers (the deed now involved, and those presented by Mr. Flynn), she would not have known what property was described, or that they affected different lots, and that she was not posted with reference to descriptions. The latter part of her cross-examination was as follows:

"Q. You do not, as I understand, charge or claim that Mr. Chipperfield at that time did anything, either by word or act, to deceive you? A. Mr. Chipperfield did nothing. I question whether it was his duty— Q. And you have never thought, and do not now think, do you, that he, either by word or act, at that time did anything to deceive you? A. I think he did. Q. Have you not, Mrs. Flynn, stated to Mr. Chipperfield that you do not think that he had any thought of deceiving you,—that he had any intention of it? A. I don't just exactly know how the words that I used in my letter might be interpreted. I wrote Mr. Chipperfield a letter, and I felt at the time that he had not intentionally done me any wrong. Q. That is the letter which you wrote to Mr. Chipperfield concerning this transaction, is it not? A. Yes, sir."

The letter was put in evidence, marked "Exhibit D." Mrs. Flynn then testified:

"I never thought Mr. Chipperfield intentionally wished to do me a wrong."

Exhibit D (the letter from Mrs. Flynn to Mr. Chipperfield) was written about the time this action was commenced, and in it was this paragraph:

"I did not intend to accuse you of deceiving me, and do not think you had any such thought, but I am as sure there was no explanation given me as I am that I live and breathe."

Mr. Flynn's testimony in respect to what transpired at the church did not differ from that of his wife, and there were no other witnesses, except Mr. Chipperfield, whose testimony was taken by deposition in another state. Mr. Flynn practically admitted that

he deceived his wife when obtaining her signature, because he did not want her to know that their house was being mortgaged. He also stated that, after Mrs. Flynn had signed, he went with Chipersfield to the court house, where the latter paid taxes due upon the property, and placed the deed on record.

We have thus detailed every particle of evidence through which an attempt was made to connect plaintiff's agent with the alleged fraud, and, as before stated, there is nothing whatsoever which tends to indicate Chipersfield's knowledge or participation. For us to even infer that he knew of the fraud, we should have to say that although, so far as shown, he was a stranger in Little Falls, and totally ignorant of Flynn's property holdings, outside of the lots he proposed to mortgage, Chipersfield knew that Flynn owned a business block in that place, and had also learned that this block was on a corner, and, further, in some unaccountable manner, had discovered that when Mr. and Mrs. Flynn were talking over business matters, and referred to "our corner," they meant the business corner, and not the corner on which they resided.

The facts are that, unfortunately for the wife, she had placed confidence in her husband, and for years had relied upon his statements as to the contents of instruments brought for her signature. Although a lady of education and culture, she knew nothing of land descriptions; so that, had she read the deed, she would have discovered nothing wrong about it.

This answers the suggestion that the necessity of Chipersfield's taking a train soon to arrive affected the transaction. She trusted the whole matter to her husband, and he practiced a fraud in the presence of Chipersfield, an innocent witness of the defendants' signatures to the conveyance. The fraud complained of was the act of her husband alone, and the result of the wife's own fault and negligence. All of this is conclusively established by her own testimony, in which she exculpates Chipersfield from all charges of bad faith, expressly admits that he had no intention of deceiving and places the culpability where it belongs.

To hold that on such facts the plaintiff's security could be swept away would render it unsafe for any person to have business transactions with a married man involving the taking of a real-estate

mortgage. The law which is to be applied to the evidence where an attempt is made to avoid an instrument for fraud in its execution has often been stated by this court, and we need not cite authorities.

Order reversed and a new trial ordered.

A. M. HOVE v. BANKERS' EXCHANGE BANK and Others.

January 17, 1899.

Nos. 11,386—(77).

Shifting Position upon Appeal—Filing Claim with Receiver of Insolvent Bank.

Where a party moves the court below for leave to file a claim with a receiver appointed in proceedings instituted under the provisions of G. S. 1894, c. 76, and alleges in his moving papers that the time fixed by the court for filing has expired, but asks relief on the ground of excusable neglect, he cannot shift his position on appeal, and contend that the time within which claims are required to be exhibited has not expired, because the provisions of G. S. 1894, § 5911, were not observed by the court when making its order.

Discretion of Court.

There was no abuse of discretion when the court below denied the motion.

From an order of the district court for Hennepin county, Smith, J., denying a motion for leave to file the claim described in the opinion, Gunder B. Gunderson appealed. Affirmed.

Alvord C. Egelston, for appellant.

The notice provided for in G. S. 1894, § 5911, and required to be given to creditors is mandatory and exclusive. *Buffum v. Hale*, 71 Minn. 190; *Minneapolis Paper Co. v. Swinburne Printing Co.*, 66 Minn. 378; *Hanson v. Davison*, 73 Minn. 454; *National G. A. Bank v. St. Anthony Park R. E. I. Co.*, 61 Minn. 359; *McKusick v. Seymour, Sabin & Co.*, 48 Minn. 158.

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A. B. Darelius, for respondent.

COLLINS, J.

Appeal from an order denying appellant's motion for leave to file with its receiver a claim against defendant bank, which, according to the moving papers, was based upon the fraud and deceit of the president of such bank, practiced upon the claimant by inducing him, while the bank was a going concern, to accept as part payment upon his deposit on open account a worthless certificate of deposit for \$500, payable to the order of the bank, purporting to have been issued by another bank, and maturing about 11 months thereafter, with interest at 8 per cent. The motion was made upon the grounds that the claim was a just and valid one, and that the claimant's failure to file it within the time limited therefor was through excusable neglect.

1. In this court counsel for appellant contends that as the proceedings wherein a receiver was appointed for defendant bank were under G. S. 1894, c. 76, and the order to file claims, which bore date April 8, 1897, and required all claims to be filed before May 15 of that year, failed to comply with the requirements of G. S. 1894, § 5911, but was made as if the original action against the bank was an ordinary insolvency proceeding, there has been no valid order made, requiring creditors of the bank to exhibit their claims and become parties to the proceedings. He claims, as a consequence, he is not in default.

The point is not properly before us for decision. In his moving papers appellant assumed that a valid order limiting the time for filing claims had been made, and that the time had duly expired. He sought to be relieved from an admitted default on the ground of excusable neglect. The court below passed upon this question. It has never considered the one now presented. The appellant cannot now shift his position, and take one directly opposed to that occupied in the court below. He must abide by the allegations in his application for relief in that court, and cannot now be allowed to deny facts distinctly affirmed and passed upon when his motion was denied.

2. Assuming that the appellant had a claim which might have been allowed, if presented in time, and that his method of procedure for leave to file is regular, we have simply to inquire whether the

court below abused its discretion when it refused to excuse him for his failure or neglect to file the claim within the prescribed time. A statement of the facts will show that there was no abuse of discretion.

The appellant was a stockholder in defendant bank, and on January 25, 1896, had on deposit therein, on open account, over \$4,000. On that day the president of the bank advised him that there was immediate danger of the bank's failure, unless the larger depositors would take some of its bills receivable in satisfaction and payment of their deposit accounts. This was at appellant's place of business, not at the bank; and the somewhat accommodating president had with him interest-bearing bills receivable, belonging to the bank, amounting to \$4,000, including the worthless certificate before mentioned. Within a half hour the transaction was completed. The president, in behalf of the bank, indorsed all of the paper, without recourse, and delivered it to appellant; and he turned over his check for the sum of \$4,000, which reduced his deposit to a trifle over \$200.

It was in this transaction that the alleged fraud and deceit were practiced. The \$200 was checked out by appellant before the bank closed its doors. The receiver was appointed February 10, 1897, or within two weeks after appellant obtained the paper with full knowledge of the situation.

About March 1 he learned that the certificate was of no value, and he then accepted the personal obligation of the party who had signed it, as cashier of the pretended bank, for the amount due, and surrendered the certificate to him. The note matured in December, 1897, and was not paid, and it is averred that the maker was and is insolvent.

Meantime, as before stated, the order requiring creditors to file their claims had been made, the time therein specified (May 15, 1897) had expired, and those who had acted upon it, and whose claims had been allowed, had been paid 90 per cent. of the amounts due. Then, upon February 18, 1898, alleging that he had no knowledge of the order as to the filing of claims until a few days previous, the appellant made the motion in question. In the exercise of a sound discretion, the court below had the right, and it was its duty, to take into

consideration all that had transpired in regard to this matter from the time appellant (with notice of the precarious condition of the bank in which he was a stockholder), with the help of its president, obtained, as he supposed, assets of the value of \$4,000 in preference to other creditors, who have received only 90 per cent. of their dues, and this through the receivership proceedings, down to February 18, 1898, when he first seems to have realized that he had any claim upon the assets in the possession of the receiver not already distributed. It is obvious that appellant was not entitled to any relief at the hands of the court.

Order affirmed.

C. H. ROSSMAN v. C. T. MOFFETT.

January 17, 1899.

Nos. 11,461—(217).

Trial—Change of Judge during Trial—G. S. 1894, § 4842.

The words, "except in trial of causes when the trial has already commenced," found in G. S. 1894, § 4842, prohibit, by implication, a change of judges after a trial has commenced in district court, in so far, at least, as material matters are concerned.

Sickness of Presiding Judge—Charge to Jury.

The judge who tried this cause was taken sick after the testimony was all in and the closing arguments of counsel had been made, and was unable to personally charge the jury. *Held*, that the jury should have been discharged and a new one impaneled.

Action in the district court for Hennepin county by the receiver of the Fred B. George Stationery Company, an insolvent corporation, to recover \$1,000 upon promissory notes. At the trial the proceedings mentioned in the opinion were had. From an order, Elliott, J., denying a motion for a new trial, plaintiff appealed. Reversed.

W. A. McDowell, for appellant.

Wendell Hertig and *Robert Jamison*, for respondent.

COLLINS, J.

From the record before us in this action it appears that when the testimony was all in and the arguments of counsel had been made to the jury, April 26, 1898, the court, the late Hon. Seagrave Smith presiding, adjourned until the next day. Sickness prevented Judge Smith from resuming the trial on the following day, and he never returned to his judicial duties. Another judge of the same judicial district excused the jury several times thereafter, ordering them each time to be present on a day certain.

On May 4, the jury being present as ordered, the judge last mentioned read to the jury, from sheets of paper, what purported to be a charge in the case, caused the jury to retire, and afterwards received their verdict. These sheets of paper were handed to the judge, who read this so-called charge, by Judge Smith's official stenographer, with a statement that the matter had been dictated to him by Judge Smith at the latter's residence, had then been written in short hand, had then been typewritten by himself, and afterwards examined and corrected by Judge Smith.

At the outset of these proceedings counsel for plaintiff objected to the same, and to all thereof, and saved these objections by proper exceptions to the rulings thereon. The verdict was for defendant.

Several assignments of error are made and argued, and of these but one need be considered. This has reference to the matters contained in the foregoing statement of facts. G. S. 1894, § 4842, reads as follows:

"In all actions and proceedings now or hereafter pending in any district court of this state, or before any judge thereof, except in trial of causes where the trial has already commenced, where the judge who should be present at any hearing is not so present by reason of sickness or otherwise, any judge of the same judicial district may act in the place of said judge, who is not so present, with the same jurisdiction, power and effect as if such action or proceeding was conducted and acted upon by said absent judge."

The implied prohibition in this section, found in the words, "except in trial of causes where the trial has already commenced," compels us to hold that there was error in not sustaining the objections made by counsel to the action of the judge who read the

purported charge to the jury, sent them out to deliberate upon, and finally received, their verdict.

We are not prepared to say that, in the absence of the judge who has presided over a trial, the language should be so construed as to render it improper for another judge to perform some of the duties of the absentee,—such, for instance, as adjourning the trial, or discharging the jury in case of a disagreement, or because of such absence, or in receiving a verdict,—but it is obvious that the object of the words used in section 4842 is to prevent the substitution of a presiding judge after the trial has commenced, and while any material matters of the trial are under consideration.

But counsel for defendant contends that the charge read was that of Judge Smith, and should be treated as if he had personally delivered it to the jury. This position cannot be indorsed. Even if it had been completely established by legal evidence that, in fact, the contents of the paper read had been prepared under the direction of Judge Smith, as his charge in the case,—and there was no proof of this, nothing but the stenographer's statement,—such procedure could not be countenanced in a court of justice for reasons which readily suggest themselves.

If a judge could prepare his charge at his residence, and send it to be read to the jury, as his charge, it would be immaterial who read it or how it reached them. It could be wired or telephoned, or the services of a phonograph could be brought into requisition, or it might be communicated to the jury through the medium of the newspaper. If such an important feature of the trial as the charge can be transmitted and placed before the jury in any of these ways, no reason exists why rulings upon the trial cannot be communicated to counsel in the same manner. The possibilities in this direction are so great that in time we might have criminals sentenced without the personal appearance of the trial judge.

It cannot be held that this was the charge of Judge Smith. And no one claims it to have been the charge of the judge who read it, and who could not have charged the jury, except by consent of parties, because of the prohibition by implication found in the above-quoted language. As plaintiff refused to consent to a change of

judges upon the trial, the jury should have been discharged, and a new one impaneled.

Order reversed, and a new trial granted.

STATE ex rel. CITY OF ST. PAUL v. DISTRICT COURT OF RAMSEY COUNTY and Another.

January 20, 1890.

Nos. 11,329—(25).

Municipal Corporation—Local Assessment for Public Park.

Held, while a public park is a general benefit to the whole city, it is also, as a general rule, a special benefit to the locality or part of the city in which it is established, and, to the extent that it is such a special benefit, the cost of it may be assessed on the property so specially benefited.

City of St. Paul—Sp. Laws 1891, c. 35—Benefits.

Held, Sp. Laws 1891, c. 35, does not provide that such property may be thus assessed for more than it is actually benefited.

Same—Confirmation of Assessment within Four Months.

Held, the provision in section 26 of said act, requiring the board of public works of St. Paul to complete and finally confirm the assessment for such benefits within four months after receiving from the park board the order to condemn the park and make the assessment, is mandatory, and, if the assessment is not confirmed within that time, the board loses jurisdiction.

Same—Double Taxation.

Where a part of a parcel of land is taken for park purposes, *held* said chapter 35 does not provide for assessing double benefits on the balance of the tract, and, even if the act did so provide, it would only be unconstitutional to the extent of eliminating the feature of it which provided for such double taxation.

The treasurer of the city of St. Paul applied to the district court for Ramsey county for judgment against numerous parcels of real estate for nonpayment of a certain local assessment aggregating about \$115,000, levied by the city for the purchase of Phalen Park, so called. The persons interested therein appeared and filed ob-

jections. The matter was heard before Bunn, J., without a jury, who denied the application for judgment. Thereupon the matter was brought into this court by writ of certiorari. Affirmed.

James E. Markham and Carl Taylor, for relator.

It is well established in this state that the determination by the legislature, or by the board of public works to whom legislative authority is delegated, that a particular improvement partakes of a local nature, is final, except in cases of fraud or palpable mistake. *Rogers v. City of St. Paul*, 22 Minn. 494; *Carpenter v. City of St. Paul*, 23 Minn. 232; *State v. District Ct. of Ramsey Co.*, 33 Minn. 295. The provision of Sp. Laws 1891, c. 35, which requires the assessment to be made within four months is merely directory. In the case of *State v. Brill*, 58 Minn. 152, where the validity of the same statute was involved, the lower court decided that the four-months provision was directory, and not mandatory. The question was not passed upon by this court on appeal, although fully argued by counsel on both sides. In *State v. District Ct. of Ramsey Co.*, 68 Minn. 242, the law under consideration provided that a new assessment should be made without unnecessary delay. The application for judgment in that case was denied May 27, 1889, and the new assessment was not confirmed until December 24, 1894, and the court held that it should stand. The authorities are uniform that, if the purpose of the statutory provisions as to time be simply to prescribe an orderly and prompt method of transacting business, an omission of any of the details does not, and could not, prejudice any person's rights or affect his opportunities for defense against proposed proceedings. The provisions in such cases are considered merely directory. *Cooley*, Taxn. 212; *Kipp v. Dawson*, 31 Minn. 373, 380.

How & Butler, by consent, filed a brief in behalf of relator.

In the absence of fraud, or of any demonstrable mistake of fact, in the proceedings of the park board and of the board of public works, in their respective capacities, the determination by such boards of the matters intrusted to them respectively by the legislature, is conclusive upon the courts. *State v. District Ct. of Ram-*

sey Co., 33 Minn. 295; *State v. Board of Public Works*, 27 Minn. 442. The limits of local assessment were properly determined by the board of public works. See *State v. District Ct. of Ramsey Co.*, *supra*; *State v. Brill*, 58 Minn. 152; *Cooley*, Taxn. 449; *Kelly v. Minneapolis City*, 57 Minn. 294; *Wright v. City*, 48 Ill. 285, 291.

John B. Sanborn, Samuel Whaley, Davis, Kellogg & Severance, Harold Harris and Stevens, O'Brien, Cole & Albrecht, for respondents.

Sp. Laws 1891, c. 35, is unconstitutional for the reason that, by its operation, it compels an illegal mode of assessment, and provides for no investigation, before deciding to take land for park purposes, to ascertain whether lands to be assessed can be found benefited to the extent of the cost of acquiring the land. Instead thereof, it provides that the whole cost of the improvement (whatever that amount may be), less any appropriation from the park fund, shall be assessed on lands benefited. An assessment, the amount of which is based solely on the cost of the improvement, is void. *St. John v. City*, 50 Ill. 92; *City v. Larned*, 34 Ill. 203; *City v. Spencer*, 40 Ill. 211; *Bedard v. Hall*, 44 Ill. 91; *Greeley v. People*, 60 Ill. 19; *Tidewater v. Coster*, 18 N. J. Eq. 518; *In re Canal St.*, 11 Wend. 154; *Johnson v. City*, 40 Wis. 315, 327. Assessment for benefits must be limited by the amount of actual special benefits accruing to the property affected by the improvement. *Cooley*, Taxn. (2d Ed.) 606, 607; *White v. City*, 67 Mich. 33; *Wright v. City*, 9 Cush. 233; *Rogers v. City of St. Paul*, 22 Minn. 494. The law is also unconstitutional because it requires double taxation within the rule laid down in the case of *State v. District Ct. of St. Louis Co.*, 66 Minn. 161.

Local improvement signifies an improvement made in a particular locality by which the real property adjoining, or near such locality, is specially benefited. *Rogers v. St. Paul*, *supra*. See also *State v. District Ct. of Ramsey Co.*, 33 Minn. 295; *State v. Reis*, 38 Minn. 371; *City v. Law*, 144 Ill. 569; *Hanscom v. City*, 11 Neb. 37; *Village v. Wiswall*, 155 Ill. 262; *Hammett v. Philadelphia*, 65 Pa. St. 146; *Washington Ave.*, 69 Pa. St. 352, 358; *Hill v. Higdon*, 5 Oh. St. 243; *Wilson v. Board*, 133 Ill. 443.

The time limit in the act, providing for confirmation of the assess-

ment within four months after the receipt of the order from the park board, is mandatory. See *Cavanaugh v. McLaughlin*, 38 Minn. 83; *Cooley, Taxn.* 216. Statutes authorizing improvements must be strictly pursued. The observance of every one of the substantial requirements must be regarded as a condition precedent to any valid assessment. None of the steps prescribed can be regarded as directory merely. *Id.* 659. When lands are to be taken under statutory authority in derogation of the common law, every requisite of the statute having the semblance of benefit to the owner must be strictly complied with. *Sharp v. Speir*, 4 Hill (N. Y.) 76; *McComb v. Bell*, 2 Minn. 256 (295); *Sewall v. City of St. Paul*, 20 Minn. 459; *Atkins v. Kinnan*, 20 Wend. 240. When the statute directs a thing to be done, or prescribes the form, time or manner of doing it, it must be done in the form, time and manner prescribed, or the act is invalid. *Chandler v. Spear*, 22 Vt. 388; 25 Am. & Eng. Enc. 300. The state and its officers are as much bound to observe the law, and proceed in the mode pointed out by statute in the collection of a tax, as are individuals in the enforcement of any statutory right. *People v. Biggins*, 96 Ill. 481; 25 Am. & Eng. Enc. 300; *Merritt v. Village*, 71 N. Y. 309; *Savage v. City*, 131 N. Y. 568. A state in a suit to enforce the special assessment has the burden of showing performance of the conditions precedent. *Lufkin v. City*, 56 Tex. 522; *Board of Co. Commrs. v. Nettleton*, 22 Minn. 356, 365. Where the law requires the city commissioners of assessment for the opening of streets to file their report and map within 20 days after the ordinance which authorizes the proceeding is referred to them, and they have failed to perform that duty within the time required, their proceedings in the matter will be set aside for that reason. *State v. City*, 35 N. J. L. 332; *State v. Town*, 4 Vroom, 39, 72; *State v. Town*, 33 N. J. L. 39. See also *Thames v. Lathrop*, 7 Conn. 550; *Billings v. Detten*, 15 Ill. 218; *Marsh v. Chestnut*, 14 Ill. 223.

CANTY, J.

The city of St. Paul applied to the district court for judgment for certain delinquent special assessments on certain real estate claimed to be specially benefited by the establishment of Phalen

Park, which assessments were levied to pay the cost of condemning land for the park. The respondents (130 in number) appeared, answered, and objected to the entry of judgment on various grounds. On the hearing, the court denied the application for judgment. Thereupon the city sued out a writ of certiorari in this court, and the proceedings in the court below were brought up in the return.

1. While a public park is, to some extent, a general benefit to the whole city, it is also, as a general rule, a special benefit to the locality or part of the city in which it is established. The extent of these special benefits is a question of fact to be determined in each particular case, and, of course, the property specially benefited cannot be assessed for more than the amount of such special benefits. But, up to this amount, it may be assessed for such special benefits, even though the park is also a general benefit. See *Steiner v. Sullivan*, 74 Minn. 498, 77 N. W. 286. In such a case, the legislative authority has a very extensive discretion in determining whether the expense of the improvement shall be defrayed by a special assessment or a general tax, or partly by each.

2. There is nothing in the claim that Sp. Laws 1891, c. 35, permits the board of public works to assess as benefits more than the amount which the property assessed is actually benefited by the improvement. The statute will not bear that interpretation.

3. This chapter 35 provides that, when the board of park commissioners of St. Paul determine to take any tract of land for a park, they shall do so by resolution, and shall thereupon make an order directing the board of public works to determine the amount of damages or compensation to be paid for the land so taken, and after deducting the amount of such compensation, to be paid out of the general park fund, to assess the balance on the property to be benefited. It is further provided that a copy of the resolution and of the order shall be certified to the board of public works.

Section 26 provides that the assessment for benefits shall be finally confirmed by the board of public works within four months after receiving the certified copies of such order and resolution from the park board. In this case the assessment was not confirmed within the four months, or until more than nine months after receiving the copies of the order and resolution from the park

board. We are of the opinion that the provision in the statute requiring the assessment to be confirmed within the four months is mandatory, and not directory, and that at the end of the four months the board lost jurisdiction to confirm the assessment. Where the purpose of the statute is merely to prescribe a prompt and orderly method of transacting public business, a provision designating the time within which a thing shall be done is generally construed to be directory; but, when the provision is intended for the benefit of particular individuals in proceedings in invitum, it is generally construed to be mandatory. In our opinion, the provision here in question is of the latter kind.

The statute provides that, on receipt of the order from the park board, the board of public works shall give 20 days' notice of the time and place of the meeting for the purpose of making the assessment. All persons interested may appear and be heard. The board shall determine the value of the real estate to be condemned, and assess the benefits therefor, and, when the assessment is completed, the board shall give 10 days' notice of that fact, and that, at a time and place specified, the board will meet for the purpose of hearing objections thereto, that objections may be filed and the matter heard.

When the assessment is confirmed the clerk of the board shall give notice of that fact, and any person who has filed objections to the assessment as aforesaid may, within 10 days thereafter, appeal to the district court from the order confirming the assessment. It is further provided that each of these notices shall be given by one publication of it in a newspaper. No personal notice is required. Then the party interested must watch for these published notices, and learn, at his peril, what steps are being taken by the board. But the statute has placed a limit on the time during which he may be thus kept watching in order to have an opportunity to defend his rights, and has limited that time to four months. Clearly, this provision of the statute is intended for the benefit of the persons whose property may be assessed for special benefits resulting from such taking, and it is immaterial whether there are 130 or only one of such persons.

4. Respondents contend that the act in question is unconstitu-

tional, because it provides for double taxation, as did the act passed on in *State v. District Court for St. Louis Co.*, 66 Minn. 161, 68 N. W. 860. We cannot so hold. Section 22 of said chapter 35 provides:

"If the damages to any person be greater than the benefits assessed, or if the benefits be greater than the damages, in either case the said board of public works shall strike a balance and carry the difference forward to another column, so that the assessment may show what amount is to be received or paid by such owners respectively, and the difference only shall in any case be collectible of them or paid to them."

Clearly, this section does not provide for assessing benefits twice on the balance of the parcel of land remaining after a part of it is taken for the park, but expressly provides to the contrary. Even if the act did provide for such double taxation, but was in other respects constitutional, it would be unconstitutional only to the extent of eliminating the feature of the act which provided for such double taxation. This disposes of the present appeal, and we will not at this time attempt to go into the other questions raised.

Order affirmed.

VAN DUSEN-HARRINGTON COMPANY v. N. JUNGBLUT.

January 20, 1899.

Nos. 11,379—(231).

Broker—Purchase of Wheat "Futures."

The plaintiff corporation, a broker and member of the Chamber of Commerce at Minneapolis, received from defendant an order to purchase 5,000 bushels of May wheat for him, and executed the order according to the usage and custom of the business. *Held:*

Same—Authority of Broker to Advance Margins for Customer.

1. From the course of dealing between plaintiff and defendant, stated in the opinion, it conclusively appears that it had implied authority from him to advance money to pay his margins, and continue the deal so made for him.

Same—Presumption—Custom of Local Market.

2. It must be presumed that defendant gave plaintiff authority to make

the deal in question according to the usages and customs prevailing in the market in which the deal was to be made.

Same—Sale and Purchase by Corporations with Same Officers.

3. According to such custom, plaintiff had a right, on the failure of defendant to pay margins, to close out the deal by selling the same on the open board of the chamber, which it did, and the deal was purchased by another corporation, some of whose officers are officers of plaintiff.

Same.

4. In the absence of any showing that any prejudice resulted to defendant from the fact that the two corporations were thus related, that fact alone is not sufficient to avoid the sale.

Action in the district court for Hennepin county to recover \$250. The cause was transferred to the district court for Ramsey county and was tried before O. B. Lewis, J., and a jury. At the trial there was evidence tending to show that the wheat bought for defendant was sold by plaintiff to G. W. Van Dusen & Company, a corporation for which plaintiff acted as broker, the transaction consisting in the representative of plaintiff going upon the floor of the Chamber of Commerce and as agent of defendant selling, while as agent of G. W. Van Dusen & Company, he bought, the wheat. The other facts appear in the opinion. At the close of the trial the court directed a verdict in favor of plaintiff. Subsequently the motion of defendant for judgment in his favor, notwithstanding the verdict, was granted. From the order granting this motion, plaintiff appealed. Reversed.

Wilson & Van Derlip, for appellant.

The answer being but a general denial, defendant could not prove that the transaction was illegal, as being a mere wager on the future price of wheat. *Dodge v. McMahan*, 61 Minn. 175. The request to make advances of margins was implied, as the payment was made according to the usages and customs of the market, with which defendant was familiar. 27 Am. & Eng. Enc. 885, 886; 23 Id. 733; 2 Id. 573; *Mechem*, Ag. § 989; *Watts v. Howard*, 70 Minn. 122. A request to undertake an agency or employment, the proper execution of which does or may involve the loss or expenditure of money, operates not only as an implied request, on the part

of the principal, to incur such expenditure, but also as a promise to repay it; so that the employment of a broker to sell property for future delivery implies both an undertaking to indemnify the broker in respect to the execution of his agency, and a promise on the part of the principal to repay or reimburse him for such losses or expenditures as may become necessary, or as may result from the performance of his agency. *Bibb v. Allen*, 149 U. S. 481, 499; *Edwards v. Hoeflinghoff*, 38 Fed. 635, 643; *Kirkpatrick v. Adams*, 20 Fed. 287; *Hansen v. Boyd*, 161 U. S. 397, 406; *Field v. Farrington*, 10 Wall. 141, 149; 1 Am. & Eng. Enc. 1117. The plaintiff made the advances in question as required by the rules of the Chamber of Commerce. The payments were therefore compulsory. The fact that he paid without awaiting a special demand from the clearing house would not make the payments voluntary. The rules constituted an imperative demand upon all members. See *Bibb v. Allen*, *supra*; *Fowler v. New York*, 67 N. Y. 138. In the absence of an express agreement, the compensation of a broker, or factor, is determined by the usages of the trade. 4 Am. & Eng. Enc. 970. The fact that an individual is interested in two different corporations does not prevent the corporations from dealing with each other. 3 *Thompson, Corp.* § 4079.

John F. Fitzpatrick, for respondent.

Contracts in form for the future delivery of goods, not intended to represent actual transactions but merely to pay or receive differences in price, are void as against public policy. *Mohr v. Miesen*, 47 Minn. 228; *Irwin v. Williar*, 110 U. S. 499. An agent cannot sell to a firm of which he is a member, or act for both buyer and seller. 23 Am. & Eng. Enc. 726; *Crump v. Ingersoll*, 44 Minn. 84, 47 Minn. 179; *Levy v. Loeb*, 85 N. Y. 365.

CANTY, J.

The plaintiff corporation is a member of the Chamber of Commerce of Minneapolis. On January 11, 1897, plaintiff received from defendant the following letter:

"You will please purchase for me 5,000 bushels No. 1 May wheat at 78 cents, and advise. Yours truly, N. Jungeblut."

Plaintiff executed the order the next day on the open board of the chamber, notified defendant at his place of business in St. Paul to that effect, and requested him to send check for \$250. He sent the check the same day,—January 12,—stating:

“Enclosed \$250, option on 5,000 bushels May wheat.”

On January 28 defendant wrote plaintiff as follows:

“I note from today’s market report that my margins on the purchase of 5,000 bushels May wheat are exhausted, and herewith enclose check for \$150 additional margins.”

May wheat continued to fall until April 7, when it had fallen to 64½ cents, and plaintiff called on defendant for \$400 more margins, which he refused to put up, and on the next day plaintiff closed out the deal for the 5,000 bushels at 65½ cents per bushel, leaving a loss or deficiency below the amount of margins so put up by him of \$243.75 and \$6.25 commissions, or a total of \$250. This action is brought to recover this amount.

Defendant did not plead that it was a gambling transaction, and, as he did not set up any such illegality in his answer, was not able to make the defense on the trial. *Dodge v. McMahan*, 61 Minn. 175, 63 N. W. 487.

At the close of the trial each party moved that the court direct a verdict in his favor. The judge granted the motion of plaintiff, and ordered a verdict for it for \$250. Defendant thereafter moved for judgment notwithstanding the verdict, or for a new trial. The court ordered judgment that plaintiff take nothing, and that defendant recover his costs and disbursements. From this order plaintiff appeals.

1. It is contended by respondent that he never requested or authorized plaintiff to pay out the money for him, and that it should have closed out the transaction as soon as the margins put up by him had run out. The monthly statement sent him by plaintiff January 30 contains the following notice:

“On all marginal business the right is reserved to close transactions when margins are running out, without giving further notice, and to settle contracts in accordance with the rules and customs of the Minneapolis Chamber of Commerce.”

Similar notices were sent in the monthly statements of March and April. It appears by the evidence that, according to such rules and customs, this closing out was done by going upon the open board of the chamber, and selling to the highest bidder the interest of the purchaser (or seller, as the case might be) in the particular deal.

Respondent claims that under the above notice plaintiff was bound to act on this rule, and close out the deal when his margins were exhausted. We cannot so hold. The notice merely reserved to plaintiff the right to close it out. We are of the opinion that by the course of dealing between the parties it conclusively appears that plaintiff had implied authority to advance money for defendant in order to keep up and continue the transaction on his part until the time came to settle it in the month of May, unless orders to the contrary were given in the meantime.

No money accompanied his order sent January 11 to purchase the wheat. Plaintiff made the purchase, informed him of that fact, and requested him to send his check, which he did. When he found, on January 28, by the market report, that his margins had been exhausted, he did not inquire of plaintiff whether it had closed out or sold out the deal, but assumed that plaintiff had not, and sent it an additional \$150. As we shall hereinafter show, it must be presumed that defendant knew the course of dealing on the Chamber of Commerce.

It was conceded by defendant on the argument that plaintiff was personally responsible for all loss on this deal to the full extent of the fall in the market, and that, if it did not have on hand a sufficient deposit of defendant's money to cover the loss, it would have to pay the balance of such loss out of its own funds. It is plain that when defendant sent in the order on January 11 he expected plaintiff to make the deal, and thereby incur liability for loss, without first receiving any deposit at all from him, and it did so make it.

Again, after he had put up such a deposit, if, after his margin ran low, the market fell suddenly to a point where the loss would exceed the amount of the deposit, plaintiff might not have an opportunity to go upon the open board of the chamber, and sell out the deal after the amount of such deposit was exhausted, and be-

fore the market dropped below the point at which the deposit was exhausted, and thereby prevent loss to itself. Defendant knew all of this. On January 28 he promptly and voluntarily put up additional margins without being asked for them, when he found by the market reports that his margins were exhausted, and yet until April 7, when plaintiff demanded still more margin after the loss here in question had occurred, he failed to notify plaintiff that he would not pay anything more for carrying the deal.

2. Respondent contends that he employed plaintiff to act as his agent in purchasing wheat for him from some third party, and to carry and continue the contract in that form; that it appears by the evidence that a wholly different contract was made, whereby plaintiff was to become and did become the opposite party to a contract with him to sell him wheat for future delivery; that, while plaintiff was acting as his agent to buy, it attempted to become the opposite party to the contract, and sell to him wheat through itself as such agent. The contract made was of this peculiar kind, and respondent contends that it was so made without his knowledge or consent. We cannot so hold.

The Chamber of Commerce is a corporation. Its members meet daily in a certain room at a certain hour, and buy and sell large quantities of grain for both present and future delivery. No one but members are allowed these privileges. While in the great bulk of the transactions the members act as brokers or agents for others, the rules require them to buy and sell in their own names, without disclosing their principals; and this is the uniform custom. The contracts of purchase and sale are oral, and each member makes at the time a memorandum of the transaction on a card, and retains it for his own convenience. At the close of each day's transactions, it is usually found that each member has bought from and sold to various other members for future delivery, and a universal system of set-off is then resorted to.

There is another corporation, known as the Clearing Association, which acts as a universal go-between, or clearing house, for these transactions. At the close of each day's business, all of these transactions are reported to the Clearing Association, which then becomes the opposite party to the transactions of each member for

the purpose of offsetting the same. When the member is the buyer, the Clearing Association becomes the seller, and, when the member is the seller, the Clearing Association becomes the buyer. Then all of the transactions between that member and the clearing house are offset, and the balance carried in the account between them until the next day, when a new balance is struck.

But balancing new transactions is but a part of the business of the clearing house in regard to sales for future delivery. As the price goes up or down each day, the clearing house pays to the member or receives from him the difference in price on that day's balance; if, on balancing all transactions with him, it appears that he has bought more than he has sold, he is buyer as to such balance, and the clearing house is seller, and vice versa. If he is buyer as to such balance, and wheat fell in price that day, he must pay to the clearing house the difference between the price on that day and the price on the day before, and vice versa.

It will thus be seen that each member acts as a clearing house within himself as to all his customers, and that he offsets the transactions of his customers against each other, and only resorts to the Clearing Association for any balance of buyers over sellers or sellers over buyers among his own customers. Except as herein-after stated, it does not appear by the evidence whether or not defendant knew that this was the customary way of doing business in the Chamber of Commerce.

When the order of January 11 was received from defendant by plaintiff, it went upon the open board, and purchased the wheat from A. G. Chambers & Co., another member of the chamber. This transaction passed through the clearing house, and was offset and carried along from day to day in the manner above described. Then it is clear that there was no opposite party to this transaction except plaintiff's own broker, this plaintiff, and that the latter, Chambers & Co., and the Clearing Association never intended that there should be any other. But was not this also defendant's intention? He contends not. He had been dealing in options for nearly two years, and had at least three prior deals in which plaintiff acted as his broker. In his letter of January 12 he spoke of the transaction as an "option." On January 28 he wrote that he

learned from the market report that his "margins" were exhausted. When plaintiff telegraphed him on April 7 for \$400 more for margins, he answered:

"Your telegram of this morning is a surprise. I have been under the impression that, according to the general rules, you had closed my option when the margins were exhausted, as no notice to the contrary was received, and no demand for margins made, although the May price has been below 70 cents for some time; and I must decline to remit additional margins."

This would indicate that he was quite familiar with "margins" and "options," and that this class of transactions was governed by rules peculiar to the business. But whether he was thoroughly familiar with the way of conducting this business, and the rules pertaining to the same, is not material. He is bound by the custom of the business, whether he is familiar with those customs or not.

"It may be laid down as a general proposition that one who employs a broker to operate in stocks for him must be presumed to give him authority to act as other brokers do, and, in the execution of his orders, to follow the rules and usages of the stock exchange. And in the application of this rule it has been held that it is immaterial whether the principal is familiar with such rules and usages or not." 23 Am. & Eng. Enc. 733,

And the many cases cited.

"The usages of a particular place, or of a particular business, are impliedly incorporated into every contract of agency, unless the contrary is specially mentioned. The principal and agent are presumed to adopt such usages, and to agree to govern themselves in accordance with them. It is the duty of the principal to inform himself of such usages, and he cannot be allowed to say that he was ignorant of them." 27 Am. & Eng. Enc. 885, 886, and cases cited.

Respondent contends that he was not bound by the usages and customs of the Chamber of Commerce, and relies on *Irwin v. Williar*, 110 U. S. 499, 4 Sup. Ct. 160. In that case there was no clearing association, and in that respect the case differs from the one at bar. The effect of this difference we will discuss later.

The court, in *Irwin v. Williar*, relied on *Robinson v. Mollett*, L. R. 7 H. L. 802, which is still a different case. The tallow brokers

of London had a custom whereby they would meet once a month on certain settling days, and each two brokers would balance between themselves the purchases and sales made by the one to or from the other. These brokers were not members of any general organization or corporation, and, so far as appears, were at liberty to buy from or sell to any person who called himself a broker, and perhaps to or from others who did not. The broker dealing with any of these parties was personally responsible for the acts of the party with whom he dealt, and might at any time suffer a loss by the failure of the latter. In *Robinson v. Mollett* that very thing occurred by the failure of *Simpson & Co.* In such a case the broker representing a principal was not a mere disinterested stakeholder, but a party adverse to the interest of his principal, and might at any time be called upon to make good to such principal a loss occurring by reason of the failure of the other broker or party with whom the deal was made.

In the opinion in *Irwin v. Williar* the court cited *Robinson v. Mollett*, L. R. 7 H. L. 802, to the effect that the principal is not bound by the custom of which he has no knowledge, where such custom, if allowed to prevail, would work a change in the relation between the broker and his principal by permitting the agent to buy, to convert himself into a principal to sell. In the former case the following extract is quoted from the opinion of Mr. Baron Cleasby in the latter case:

"Its vice [the vice of the custom or usage] consists, I apprehend, in this: that the broker is to make the contract of purchase for another whose interest as buyer it is to have the advantage of every turn of the market; but if the broker may eventually have to provide the goods as principal, then it becomes his interest, as seller, that the price which he is to receive should have been as much in favor of the seller as the state of the market would admit. Thus the two positions are opposed."

The facts were similar in the case of *Baxter v. Sherman*, 73 Minn. 434, 76 N. W. 211, and this court arrived at substantially the same result as was arrived at in the *Robinson* case.

In the case at bar the Clearing Association took from plaintiff the risk of the failure of the opposite broker, and also the risk of

being buyer for more than it was seller, or seller for more than it was buyer. Then plaintiff became a mere stakeholder for its own customers, so far as the sales and purchases of those customers balanced each other, and took no risk except as to the failure of its own customers to pay the amounts due from them; and against this risk plaintiff had a right to demand indemnity in advance. It would seem from the evidence that the Clearing Association took all other risks, and it is not suggested that the association was not amply responsible. Again, the risks taken by the Clearing Association were merely as to the responsibility of a previously ascertained and presumably well-known circle of brokers, limited in number. Then, if plaintiff ran its business strictly according to the rules and regulations, and compelled its customers to indemnify it in advance, it was not interested adversely to any of its customers. There is no evidence that plaintiff failed to live up to these rules, except as it failed to require or compel this plaintiff to indemnify it in advance.

The burden was on defendant to plead and prove that the transaction in question was illegal, or against public policy; and he has failed to maintain that burden. Then we are of the opinion that defendant was bound by the custom, whether he knew it or not.

3. Plaintiff foreclosed defendant's rights in his deal by selling it out on April 8 to another corporation, some of whose officers are also officers of plaintiff. The two corporations were separate entities, and the mere fact that some of the officers of one are officers of the other is not sufficient alone to avoid the sale. Defendant must show that some prejudice or injury resulted to him from the fact that the two corporations were thus related. 3 Thompson, Corp. § 4079.

This disposes of the case. The order appealed from is reversed, and judgment is ordered for plaintiff on the verdict.

75 308
175 609VEGA STEAMSHIP COMPANY v. CONSOLIDATED ELEVATOR
COMPANY.

January 20, 1899.

Nos. 11,389—(222).

Bill of Lading—Deficiency in Cargo of Wheat—Subrogation.

The bill of lading for a cargo of wheat provided that any deficiency in the amount of the cargo (delivered by third party from its elevator) should be paid for by the carrier, and any excess in the amount should be paid for by the shipper to the carrier. *Held*, when the carrier paid the shipper for such a deficiency, the former was subrogated to any rights which the latter had to recover for such deficiency from the keeper of the elevator.

Weighing Grain—Certificate of Weight under G. S. 1894, § 7675.

Held, the legislature, by G. S. 1894, § 7675, intended to make conclusive the action of the state weighmaster in weighing wheat at terminal elevators in certain cities, notwithstanding the provisions of section 7706.

Same—Weights not Conclusive—Constitution.

But *held*, it is not constitutional for the legislature to make such weighing conclusive, but the same can be impeached only when the party complaining was himself free from fault or negligence, and when it is demonstrated by clear, strong and satisfactory evidence that there was, in fact, a substantial mistake in the weighing.

Action in the district court for St. Louis county to recover \$869.64, the value of 1,062 bushels of wheat. The cause was tried before Moer, J., who directed the jury to return a verdict for defendant. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

Searle & Spencer, for appellant.

A mutual mistake is a mistake reciprocal and common to both parties, where each alike labored under the same misconception of facts. *Botsford v. McLean*, 45 Barb. 478. Where parties contract under the impression that a certain state of facts exists, equity has power to relieve them from the effects of such a contract. *Shafer v. Davis*, 13 Ill. 395; *Mays v. Dwight*, 82 Pa. St. 462; *Fleet-*

wood v. Brown, 109 Ind. 567. Equity will grant relief on the ground of mistake, not only when it is expressly proved, but also when it may be inferred from the nature of the transaction. Geib v. Reynolds, 35 Minn. 331; City of Duluth v. McDonnell, 61 Minn. 288; Cobb v. Cole, 51 Minn. 48; Lane v. Holmes, 55 Minn. 379. If a mistake did occur as plaintiff contends, then defendant has 1,062 bushels of wheat that do not belong to it, and its refusal to deliver or make good after demand, constitutes a conversion for which this action will lie. G. S. 1894, § 7648; 2 Addison, Torts, 461; Adams v. Castle, 64 Minn. 505. The defendant was a bailee. G. S. 1894, § 7645; Weiland v. Krejnick, 63 Minn. 314; St. Paul & S. C. R. Co. v. Gardner, 19 Minn. 99 (132).

The plaintiff, having become surety for the shippers and made good the loss, became subrogated to the rights of the shippers in respect to the shortage, and is entitled to demand and recover from the defendant the balance of the grain or its value. Sawyer v. Cleveland Iron Min. Co., 69 Fed. 211; 1 Brandt, Sur. § 260; Swarthout v. Chicago, 49 Wis. 625; Heisler v. C. Aultman & Co., 56 Minn. 454. The right of subrogation is a creature of equity. Felton v. Bissel, 25 Minn. 15; Emmert v. Thompson, 49 Minn. 386; Travers v. Dorr, 60 Minn. 173; Memphis & Little Rock R. v. Dow, 120 U. S. 287. No formal assignment to plaintiff was necessary. The payment operated as an equitable assignment. Connecticut v. Erie, 73 N. Y. 399; Swarthout v. Chicago, *supra*; McArthur v. Martin, 23 Minn. 74; Emmert v. Thompson, *supra*.

If G. S. 1894, § 7675, is in force to the exclusion of sections 7705, 7706, and makes the action and certificates of the weighmaster conclusive, then the act is unconstitutional. See Cooley, Const. Lim. (6th Ed.) 452; Groesbeck v. Seeley, 13 Mich. 329; White v. Flynn, 23 Ind. 46; Abbott v. Lindenbower, 42 Mo. 162; McCready v. Sexton, 29 Iowa, 356; Chicago, M. & St. P. Ry. Co. v. Minnesota, 134 U. S. 418.

Davis, Kellogg & Severance, for respondent.

Every person having grain weighed at terminal elevators of this state makes the law of this state a part of his contract. The right of parties so to contract as to make a certain person the sole and

exclusive judge of any matter which may be submitted to him as to amounts or weights is well settled. *Shaw v. First Baptist Church*, 44 Minn. 22; *Langdon v. Northfield*, 42 Minn. 464; *St. Paul & N. P. Ry. Co. v. Bradbury*, 42 Minn. 222; *Leighton v. Grant*, 20 Minn. 298 (345).

CANTY, J.

Plaintiff is a common carrier of freight on the Great Lakes, between Duluth and Buffalo. Defendant owns and operates a public elevator at the dock in Duluth, in which the wheat of different parties is stored, commingled in a common mass.

On October 20, 1896, Spencer, Moore & Co. proceeded to ship from Duluth to Buffalo, on plaintiff's steamship, the *Vega*, 97,587 bushels of wheat. This wheat was stored in said elevator, and, while being delivered from the elevator to the ship, was weighed out by the assistant state weighmaster, under the laws of Minnesota. The cargo of wheat was delivered at Buffalo, but it is claimed that it fell short in weight, and that, by reason of mutual mistake in weighing the wheat at Duluth, 1,062 bushels less than the required amount were delivered on board the ship. The bills of lading delivered by plaintiff to Spencer, Moore & Co. contain the following provisions:

"All the deficiency in cargo to be paid by the carrier, and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee."

When the wheat was delivered at Buffalo to Spencer, Moore & Co., the consignees, they deducted from the freight the sum of \$869.64, the market value of the 1,062 bushels; and plaintiff brought this action to recover this amount from defendant.

On the trial the court ordered a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

1. We are of the opinion that, by reason of said clause in the bill of lading, plaintiff was an insurer that the amount of wheat called for had been delivered to it, and would be redelivered at the end of the route; and, when plaintiff paid the consignee for the deficiency, any cause of action held by the consignee therefor against defendant passed, by subrogation, to plaintiff.

2. Defendant claimed it had delivered the amount called for by the bills of lading. Elevator receipts for that amount were surrendered at the time.

On the trial, plaintiff offered to prove that there were in fact delivered from the elevator to the ship, at Duluth, 1,062 bushels less wheat than the bills of lading called for. Defendant objected to the offer, and the court sustained the objection. This is assigned as error. G. S. 1894, § 7675, provides:

“Said state weighmaster and assistants shall, at the places of St. Paul, Minneapolis, Duluth and St. Cloud, supervise and have exclusive control of the weighing of grain and other property which may be subject to inspection, except when otherwise ordered or directed by the party shipping the same, and the inspection of scales; and the action and certificates of such weighmaster and his assistants in the discharge of their aforesaid duties shall be conclusive upon all parties, either in interest or otherwise, as to the matters contained in said certificates.”

It seems that the trial court held that, under this section, the result arrived at by the state weighmaster in weighing this wheat at Duluth is conclusive, and cannot be questioned in this action. In answer to this, appellant cites section 7706, which is a part of the same act, and reads as follows:

“Said weighmaster and assistants shall give upon demand to any person or persons having weighing done, a certificate under his hand and seal, showing the amount of each weight, number of car or cars weighed, if any, the initial of said car or cars, place where weighed, date of weighing and contents of car. And it is hereby provided that said weighmaster's certificate shall be admitted in all actions, either at law or in equity, as prima facie evidence of the facts therein contained, but the effect of such evidence may be rebutted by other competent testimony.”

These two sections are in *pari materia*, and must be construed together. They are in some respects in direct conflict with each other, but that conflict must be reconciled if it is reasonably possible to do so.

Section 7675 does not attempt to make anything conclusive but the weight ascertained and the certificate of that fact, and does not provide for certifying to other facts. Section 7706 provides for certifying to a number of other facts, such as the number of cars,

the initials of the car or cars, the contents of the car or cars, and the place where weighed. When these additional facts are certified to, the certificate itself is only *prima facie* evidence of any fact therein certified. But, if the weight is proved by competent evidence other than the certificate provided by section 7706, the intent of the statute is that such weight shall be conclusive.

3. But is it competent for the legislature to make the weight thus ascertained absolutely conclusive? We are of the opinion that it is not. The legislature cannot in this manner provide for the arbitrary exercise of power, so as to deprive a person of his day in court to vindicate his rights. And the law which closes his mouth absolutely when he comes into court is the same, in effect, as the law which deprives him of his day in court. See *Cooley*, Const. Lim. (6th Ed.) 452; 6 Am. & Eng. Enc. (2d Ed.) 1050; *Graves v. Northern*, 5 Mont. 556, 6 Pac. 16; *Johns v. State*, 55 Md. 350; *Wantlan v. White*, 19 Ind. 470.

But we must give to the legislative intent the utmost effect which the constitution will permit. The statute in question is a police regulation. The business of storing and handling grain in such an elevator is affected with a public interest, is merely a link in the chain of commerce, and may be regulated by the legislature to a very considerable extent. See *Munn v. Illinois*, 94 U. S. 113, 126.

The legislature has the right to give to the act of the weighmaster in weighing grain a high character as evidence, and to provide that such act can be impeached only when the party complaining or the party under whom he claims was himself free from fault or negligence, and when it is demonstrated by clear, strong and satisfactory evidence that there was in fact a substantial mistake in the weighing. No trivial error or trivial variation between different weights is sufficient to impeach the weighing of the state weighmaster; but the alleged error in this case is 1,062 bushels in a total of 97,587, and that is sufficiently substantial.

In our opinion the case is not exactly parallel to one where the parties, by voluntary contract, provide for an umpire to decide on the matters which will arise between them. There the decision of the umpire can only be impeached for fraud or such gross mis-

take as would imply bad faith or a failure to exercise an honest judgment. *Leighton v. Grant*, 20 Minn. 298 (345); *St. Paul & N. P. Ry. Co. v. Bradbury*, 42 Minn. 222, 44 N. W. 1; *Langdon v. Northfield*, 42 Minn. 464, 44 N. W. 984; *Shaw v. First Baptist Church*, 44 Minn. 22, 46 N. W. 146.

Under the statute, the party running the elevator has no option as to whether or not the state weighmaster shall weigh the grain; and, in our opinion, the state cannot force an umpire upon such party against his will, and then close his mouth, so that he cannot show that the umpire has made a substantial mistake, whether that mistake is the result of fraud or bad faith, or merely of negligence.

Under the constitution, no sound distinction can be made on the difference between a case of bad faith and a case of mere negligence. If a gross error has been committed, and his mouth is closed by the statute, he will be deprived of his property without due process of law, whether the error is the result of bad faith or not. True, in this case, the party running the elevator is not the one who is complaining. The plaintiff is enforcing merely the rights of the shipper, with whom, under G. S. 1894, § 7675, it is optional whether the grain shall be weighed by the state weighmaster or not.

The law does not force this statutory umpire upon the shipper. The umpire is one of his own selection; and it may be contended that, as to him, the case is the same as that of a case where the parties voluntarily agreed on an umpire, and that, therefore, he cannot impeach the weighmaster's decision without showing fraud or such gross mistake as will imply bad faith. But the statute never intended to make the weighing conclusive as to the shipper, and not conclusive as to the party operating the elevator. In this respect the rights of the parties should be held to be mutual and reciprocal, and the weighmaster's decision no more conclusive as to the one than it is as to the other. The legislature never intended to give the party running the elevator an advantage in this respect. The weighing contemplated by the statute is a weighing in the course of delivery, and as a part of that delivery. There are three parties to the transaction,—the shipper, the elevator keeper, and the state weighmaster, who is umpire for the other two.

In this case the weighmaster was acting as umpire for the ship-

per and defendant; but, by reason of said clause in the bill of lading guarantying the weight, the plaintiff stepped into the shoes of the shipper in attending to the weighing and delivery of the wheat. Then, if plaintiff can, by clear, strong and satisfactory evidence, prove the alleged error as a demonstrable mistake of fact, and can further prove that it was not guilty of any fault or negligence which contributed to that error, it should have been allowed to do so. Plaintiff should have been allowed to introduce the offered evidence.

The order appealed from is therefore reversed, and a new trial granted.

PETER MCGOVERN v. CHRISTOPHER MCGOVERN.

January 20, 1899.

Nos. 11,450—(238).

Will—Misdescription of Government Subdivision—Construction of Devise.

The will purported to devise the northeast quarter of a certain section, which the deceased did not own. He owned the southeast quarter of the section, and owned no other land. *Held*, if the false description in the will is rejected as surplusage, there is no description whatever left by which the land intended to be devised can be identified, and the will does not devise the land owned by the deceased.

Peter McGovern, the executor named in the will of Thomas McGovern, deceased, petitioned the probate court for Blue Earth county to assign the residue of the estate of the testator to the parties entitled thereto. At the hearing of the petition the executor offered evidence that the will contained a latent ambiguity, and that the testator intended to devise to his wife the real estate owned by him at the time of his death. The probate court, Mead, J., having assigned the real estate to the heirs of the testator, the executor appealed to the district court of that county. From an order of the district court, Severance, J., affirming the decision of the probate court and from the judgment entered pursuant to such order, Peter McGovern appealed. *Affirmed*.

H. L. Schmitt and Lorin Cray, for appellant.

A latent ambiguity in a will, which may be removed by extrinsic evidence, arises when the will contains a misdescription of the object or subject, as when there is no such person or thing in existence, or the person is not the one intended, or the thing does not belong to the testator. *Patch v. White*, 117 U. S. 210; *Whitcomb v. Rodman*, 156 Ill. 116; *Stewart v. Stewart*, 96 Iowa, 620; *Decker v. Decker*, 121 Ill. 341; 1 Am. & Eng. Enc. 530; *Schouler, Wills*, § 268; *Case v. Young*, 3 Minn. 140 (209); *Seebrook v. Fedawa*, 33 Neb. 413; *Oades v. Marsh*, 111 Mich. 168. It will always be presumed that, when a testator devises land by as solemn an instrument as his last will and testament, he means and intends to devise his own lands. *Case v. Young*, *supra*; *Whitcomb v. Rodman*, *supra*; *Patch v. White*, *supra*; *Huffman v. Young*, 170 Ill. 290.

W. E. Young, for respondent.

When the language employed in a will is clear and of well-defined force and meaning, extrinsic evidence of what was in fact intended cannot be adduced to qualify, explain, enlarge or contradict this language, but the will must stand as written. *Schouler, Wills*, (2d Ed.) § 568; 1 *Jarman, Wills*, 76; *Jackson v. Sill*, 11 Johns. 201; *Beach, Wills*, § 346; *Kurtz v. Hibner*, 55 Ill. 514; *Judy v. Gilbert*, 77 Ind. 96; *Decker v. Decker*, 121 Ill. 341; *King v. Merriman*, 38 Minn. 47; *Sherwood v. Sherwood*, 45 Wis. 357; *Cowles v. Henry*, 61 Minn. 459; *Gilmor's Estate*, 154 Pa. St. 523, 534; *Griscom v. Evens*, 40 N. J. L. 402, 408; *Loring v. Woodward*, 41 N. H. 391.

CANTY, J.

In 1882 Thomas McGovern made a last will. He died the next day, and the will was probated. The will provides:

"After paying my lawful debts and funeral expenses, I give, devise and bequeath to my wife, Mary McGovern, the northeast quarter of section six, in township 107, range 25, and all the personal property that I may become possessed of at my death."

The deceased never owned or had any interest in said northeast quarter, but did own at the time of making his will and at the time of his death the southeast quarter of that section, and resided on the same with his wife and family. He owned no other land.

The court below held that this will did not dispose of the real estate so owned by the deceased, and awarded it to the heirs at law. Those claiming under the will appeal to this court.

In our opinion, the judgment appealed from should be affirmed. The will does not in any form state that the deceased owned the land which the will purported to devise, and if the false description in the will is rejected as surplusage, there is no description left by which the land intended to be devised can be identified. See Schouler, Wills, §§ 268, 269; 1 Jarman, Wills (6th Ed.) 412, et seq.

Judgment affirmed.

HARRIET L. C. BUDD v. TOLLEF E. BROEN and Another.

January 23, 1899.

Nos. 11,333—(205).

Authority of Agent to Receive Payment of Mortgage.

If a mortgagor pay his mortgage debt to a supposed agent of the mortgagee without the production by the agent of the note and mortgage, he assumes the risk of establishing, in case of the denial of such agency, the authority of the agent to receive such payment for the mortgagee.

Finding not Sustained by Evidence—Hare v. Bailey and General Convention C. M. v. Torkelson Distinguished.

The evidence in this case does not sustain the finding that the plaintiff's loan agents had authority to receive for her payment of a note and mortgage then in her exclusive possession. *Hare v. Bailey*, 73 Minn. 409, and *General Convention C. M. v. Torkelson*, 73 Minn. 401, distinguished.

Action in the district court for Otter Tail county to foreclose a mortgage to secure the payment of \$200. The defendants pleaded payment and prayed that the mortgage be discharged and satisfied of record. The cause was tried before Baxter, J., without a jury, who ordered judgment in favor of defendants. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

Clark & Wingate, for appellant.

E. E. Corliss, for respondents.

START, C. J.

The defendant Tollef E. Broen, on April 11, 1891, made his note for \$200, due in five years, with annual interest according to coupons attached, to Cecil H. C. Howard, and gave to him a real-estate mortgage to secure its payment. This note and mortgage were assigned to the plaintiff, and she brought this action to foreclose the mortgage.

The defense was payment in full of the mortgage debt. The trial court found that the defendant paid the note and mortgage on or about April 11, 1896, to A. F. & L. E. Kelley, who were then the general agents of the plaintiff for the collection thereof, and authorized to receive such payment for her. Is this finding sustained by the evidence? This is the only question in this case.

The plaintiff claims that any authority which the Kelleys had as to loans made by them for her does not apply to this particular mortgage, because they did not make the loan for her, but for Howard, who assigned it to her; and, further, that the mortgage was paid one day before it was due. The evidence does not justify either of these claims.

It is an admitted fact that the defendant, on April 10, 1896, paid to a local agent of the Kelleys at Fergus Falls the amount of the mortgage debt, who forwarded to them his check for the amount thereof, which reached them on the next day. They deposited the check in bank to their own credit, and credited the plaintiff with the amount on their books, but they never paid the money to the plaintiff.

When the assignment of the mortgage was made to the plaintiff, the note and mortgage were delivered to her, and continuously remained in her possession until the commencement of this action. At or about the times the interest matured, she forwarded the coupons to the Kelleys for collection, who sent them to their local agent, to whom the defendant paid them, and received the coupons on such payment. It is also true that for 13 years next before the making of this payment the Kelleys acted as loan agents of the

plaintiff, during which time they made some 30 or 40 loans for her. They passed upon the title, collected the interest and principal of the loans, reinvesting the same for her when so directed. When they made collections, either of interest or principal, it was their custom to deposit the money in bank to their own credit, and send the plaintiff their check therefor.

The evidence is ample to justify the conclusion that the plaintiff sanctioned this method of conducting the business of the plaintiff, but the evidence is also practically undisputed that whenever a loan was made the note and mortgage were sent to the plaintiff, who resided in New York City, and were there retained by her in her exclusive possession. As the coupons matured, they were sent to the Kelleys for collection, and at or about the time the principal became due she wrote to the Kelleys to ascertain if the mortgagors wished to pay, and, if so, she forwarded the note and mortgage in each case for collection, with directions as to the disposal of the fund collected.

The plaintiff concedes that the Kelleys were her agents to make loans for her, and to collect them from time to time as she sent to them the coupons, notes and mortgages for that purpose, and not otherwise; and she so testified on the trial.

The claim of the defendant is that the Kelleys were the general agents of the plaintiff to collect her loans for her, whether the papers evidencing the loans were in their possession or not. If there is any evidence in the record to sustain the contention of the defendant, it is to be found in the testimony of A. F. Kelley, who testified, in general terms, that it was agreed between his firm and the plaintiff that they would collect all interest and principal of the loan made by them for her free of charge to her, and that she should receive 8 per cent. per annum net for her money, and that they paid interest on her money in their hands before investment; and, further, that they did so collect the principal and interest of her loans. But he gave no testimony tending to show that his firm ever, to the knowledge of the plaintiff, collected interest or principal on the loans unless the coupon, note or mortgage was in their possession, or that they were authorized so to do.

In connection with this witness' testimony, 73 letters from the

plaintiff to the Kelleys were received in evidence without objection. This correspondence tends directly to support the claim of the plaintiff that it was only as she forwarded her coupons, notes and mortgages for collection that the Kelleys were authorized to collect her loans. Among these letters was one dated August 5, 1895, in which the plaintiff said:

"I wrote you from Wilton sending release of mortgage, and asking, if I signed the Jenc release, if it could be paid without sending papers until I returned to New York in September."

This is the only letter of the 73 to which counsel for defendant calls attention as indicating that the Kelleys were authorized to collect her loans without her first sending the papers to them. The natural inference to be drawn from the language of this letter is that the plaintiff, being away from home, did not have her papers with her, and could not send them until her return to her home; but as a substitute for them she sends a release of the mortgage, and asks if the loan can be paid without the papers. This implies that it was her custom to send the papers before collections were made, and that it was her understanding that it was necessary so to do.

It appears from the testimony that as a matter of fact the Kelleys did collect the principal of several of the plaintiff's mortgages without having them in their possession, but the evidence is conclusive that the plaintiff did not learn of these collections until long after the one in question was made. The Kelleys did not report such collections to the plaintiff.

It is apparent that there was no material conflict in the evidence, for, while Kelley testified that he was to collect the principal and interest of the loans without charge to the plaintiff, he did not testify that he was authorized to make such collections under any other conditions except as testified by the plaintiff; that is, as she sent the papers to him for collection in each case.

The fact that the plaintiff retained the note and mortgage in her possession is an important circumstance in this case, and the defendant, having made the payment without requiring the securities to be produced and surrendered, must establish affirmatively the authority of the agents to receive such payment. The fact that the

Kelleys were accustomed for many years to collect the principal of plaintiff's mortgages, on being intrusted with the securities in each individual case, does not warrant a finding of general authority to collect the principal of all of her mortgages which they had taken for her without having possession of them. *Trull v. Hammond*, 71 Minn. 172, 73 N. W. 642.

The fact that she did not leave the securities with her loan agents, but retained them in her exclusive possession, is very potent evidence that she did not intend to confer upon them such general authority. By so retaining her securities, and sending them for collection only as they became due, she could keep a wholesome check upon her agents, and avoid the possibility of loss through them, except as to the particular securities sent for collection. If, in such cases, the money was not remitted or the papers returned within a reasonable time, she could investigate, and at once learn whether her agents were in default. But if she conferred general authority upon them to collect the principal of any or all of her loans without first receiving the securities, she would hazard the whole of them, for she would then have no check upon her agents, or means of knowing when or what payments were made.

The defendant, having paid his note and mortgage to the Kelleys without requiring a surrender of the securities, assumed the risk of establishing the authority, express or implied, of the agents to receive such payment for the plaintiff. We are unable to find in the record any evidence that justifies the finding that the agents were so authorized. Their authority was to receive payment for the plaintiff whenever she forwarded her securities for collection, and there is no evidence warranting the conclusion that she ever knew that the Kelleys ever assumed to collect the principal of her mortgages without having first actually received them from her; hence there is no evidence of ratification of their acts, or of actual implied authority to receive payment of the note and mortgage in question.

And right here is the distinction between this case and the cases of *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213, and *General Convention C. M. v. Torkelson*, 73 Minn. 401, relied on by the defendant. In each of the latter cases there was evidence showing that the custom of the Kelleys to collect loans which they had made without

having the securities in their possession was brought home to the mortgagee, and no objections were made to their conduct in so dealing with the loans; therefore it was held that the evidence was sufficient to warrant the conclusion that the mortgagee recognized and admitted the existence and authority of the loan agents to collect the mortgage, although it was not in their possession. There is no such evidence in this case, and the finding here in question is not sustained by the evidence.

Order reversed, and a new trial granted.

MARIT H. BENGTTSSON and Others v. MARY JOHNSON.

January 23, 1899.

75	321
86	147

Nos. 11,394—(210).

Construction of Will by Probate Court—Res Judicata.

A testator, who left no issue, father or mother, gave by his will \$500 to H., to be paid by his wife, but, if not paid within five years, H. was to have the west half of his real estate. If H. was dead, the \$500 was to be paid to the testator's nearest relatives. H. was dead. The residue of his estate he gave to his wife. The personal property was insufficient to pay the legacy, and it has never been paid. The probate court, by its decree of distribution, assigned the residue of the estate to the widow without condition or reservation. *Held*, that the construction placed on the will by the probate court by its decree is conclusive on all persons interested in the estate, and that neither the widow nor the real estate so assigned to her is liable for the payment of the legacy.

Action in the district court for Douglas county to recover \$500, alleged to have been bequeathed to plaintiffs by the will of said deceased. At the trial both parties moved for judgment on the pleadings. The motion of defendant was granted, Baxter, J. From the judgment entered in favor of defendant, plaintiffs appealed. Affirmed.

G. J. Lomen, for appellants.

The defendant as residuary legatee and devisee accepted the provisions of the will and thereby obligated herself to pay the legacy.

Wright v. Denn, 10 Wheat. 204; Etter v. Greenawalt, 98 Pa. St. 422; Headley v. Renner, 129 Pa. 542. Where legacies are given generally, and this is followed by a residuary devise of the rest and residue of the real estate and personal property as one mass, the legacies are charged upon this residue of the real as well as the personal property. Hutchinson v. Gilbert, 86 Tenn. 464. See Brooks v. Brooks, 65 Ill. App. 326; Hill v. Bean, 86 Me. 200; Stevens v. Fowler, 46 N. J. Eq. 340; Brown v. Knapp, 79 N. Y. 136; Reid v. Corrigan, 143 Ill. 402. The defendant widow is not the nearest relation, as she was to make payment of, and not to receive, the legacy. She could not be one of the next of kin. See Ennis v. Pentz, 3 Bradf. (N. Y. Sur.) 382; Cleaver v. Cleaver, 39 Wis. 96; Esty v. Clark, 101 Mass. 36; Drake v. Gilmore, 52 N. Y. 389; Varrell v. Wendell, 20 N. H. 431.

H. Jenkins, for respondent.

No question is raised as to the legality of any of the proceedings of the probate court in the matter of the adjudication of the will of the testator. This decree of distribution was a judgment in rem. Whether in accordance with a correct construction of the will, or not, it is binding and conclusive upon all persons interested in the estate of the deceased, whether under disability or not. Ladd v. Weiskopf, 62 Minn. 29. As the probate court in its final decree of distribution did not charge the respondent, the sole distributee of the estate, personally, or charge the land with any legacy, it is evident that the construction of the will by that court did not warrant such a charge. Such construction is binding unless reversed on appeal from the decree. As the plaintiffs did not appeal, they are precluded from raising the question of the proper construction of the will by the probate court in this action. Eddy v. Kelly, 72 Minn. 32; State v. Jamison, 69 Minn. 427. An intention to charge a legacy upon the land is only inferred, where the personal estate was largely and clearly insufficient for the payment of the legacies given, and the testator must have known and understood that they could not be paid except by the aid of the real estate. Briggs v. Carroll, 117 N. Y. 288; Brill v. Wright, 112 N. Y. 129.

START, C. J.

The trial court in this case ordered judgment on the pleadings for the defendant. It was so entered, from which the plaintiffs appealed.

The facts as disclosed by the pleadings are these: Ole Johnson, of Douglas county, on September 4, 1891, died testate, seised of a quarter section of land situated therein, and designated in his will as his homestead. He left him surviving the defendant, Mary Johnson, his widow, and the plaintiffs, his brother and three sisters. He left no issue, father or mother. His will was duly allowed and probated, and the defendant appointed executor thereof, by the probate court of the proper county. The material provisions of the will were as follows:

"First. I order and direct that my executrix, hereinafter named, pay all my just debts and funeral expenses as soon after my decease as conveniently may be.

"Second. After the payment of such funeral expenses and debts, I give, devise and bequeath, 1st, to Sophia Son Halverson, of Bosjo Socken, Jeutland, Sweden, five hundred dollars, to be paid by Mary Johnson, my wife, within five years of my death, at three per cent. per annum. If not paid as stipulated, then the said Sophia Son Halverson is to have the west half of my homestead, Sec. ten, township one hundred thirty, range 36, clear of incumbrance. If the said Sophia Son Halverson cannot be found, or is dead, then the said five hundred dollars is to be paid to my nearest relatives. 2nd. I bequeath to my wife, Mary Johnson, all the remainder of my property, real and personal, after my debts are paid.

"Lastly, I make, constitute, and appoint Mary Johnson, my wife, to be executrix of this, my last will and testament, hereby revoking all former wills by me made."

Sophia Son Halverson died in the lifetime of the testator. After the payment of the debts of the testator and the expenses of the administration, the personal estate was insufficient to pay the legacy of \$500, and it has in fact never been paid. The probate court, upon the settlement of the estate, duly made its final decree of distribution, and thereby assigned to the defendant all of the residue of the estate of the testator without any reservation or provision as to the payment of the legacy of \$500. Thereafter the plaintiffs, as the nearest relatives of the testator, brought this action to recover from

the defendant the amount of the legacy, and to make it a specific charge upon the real estate so assigned to her.

Do these facts constitute a cause of action in favor of the plaintiffs? We answer the question in the negative. The claim of the plaintiffs is, briefly stated, that the will expressly charged the defendant with the payment of the legacy of \$500; that she accepted the will as residuary legatee and devisee, and thereby obligated herself to pay the legacy; and, further, that the taking of the residue of the estate by her was conditional upon the payment by her of the legacy. It is to be noted that the will gave to the widow the residue of the estate after the payment of the debts, which was exactly what she would have been entitled to if there had been no will.

If this was an appeal from the decree of distribution, this court would have jurisdiction to construe the will, and modify the decree, if it was found that the probate court had, by its decree, erroneously construed the will. That court had jurisdiction to construe the will, and did so by its decree. Whether it construed the words "my nearest relatives," found in the will, as including the widow, or whether it was of the opinion that, in case the legacy fell to the nearest relatives, its payment was not a charge on the real estate, or upon what particular construction of the will the court proceeded in making its decree, we need not inquire, for it may be conceded, without so deciding, that any construction of the will consistent with the decree was erroneous.

But the fact remains that the probate court did not, by its final decree, charge the defendant personally, or the real estate assigned, with the payment of the legacy, for the reason that its construction of the will did not warrant such charges. Such construction, as evidenced by the decree, is conclusive, unless reversed or modified on appeal or other direct proceeding. The decree of distribution is a judgment in rem, and, whether it is in accordance with a correct construction of the will or not, it is conclusive upon all persons interested in the estate of the testator. *Greenwood v. Murray*, 26 Minn. 259, 2 N. W. 945; *Ladd v. Weiskopf*, 62 Minn. 29, 64 N. W. 99.

The decree of distribution in this case necessarily involved a determination by the probate court of the terms and conditions, including the question of the personal liability of the widow, upon

which she took under the will the property assigned to her. *Eddy v. Kelly*, 72 Minn. 32, 74 N. W. 1020. The decree having assigned the residue of the testator's property to the defendant without reservation or condition, it is conclusive upon the plaintiffs, and neither the defendant nor the property so assigned to her is liable for the payment of the legacy.

Judgment affirmed.

MITCHELL, J. (dissenting).

I am unable to concur in the opinion of the court. I apprehend that there is no doubt, under the authorities, that, according to the correct construction of this will, the devise of the land was subject to the payment of the legacy, and that by accepting the devise the devisee would become personally liable to pay the legacy.

The theory upon which the court proceeds is that by the decree of distribution the probate court has decided otherwise, and that its construction of the will is conclusive, unless reversed or modified on appeal. The probate court did not expressly so decide. If it has so decided, it can only be by implication, because it did not expressly assign the real estate subject to the payment of the legacy, or on condition that the devisee should pay it.

The devisee took under the will. I admit that she took under it as construed by the probate court so far as that construction was necessarily involved in the decree of distribution, and that thus far that construction is conclusive. But it seems to me that the only respect in which the construction of the will was necessarily involved in making the decree of assignment was as to whom, under the terms of the will, should the property be assigned; and, according to the record, that was the only question upon which the probate court passed, and not upon the question of the liability of the defendant under the will for the payment of the legacy in case she accepted the devise. No such issue appears to have been considered or decided,—certainly not directly or expressly,—and, I presume, was never once thought of by the probate judge.

There is always great danger of injustice in applying the doctrine of estoppel by judgment to issues not expressly tendered and litigated on the ground that they were impliedly involved in the judg-

ment. This is particularly true in proceedings in rem, such as the administration of the estates of deceased persons, where many of those interested in the estate, as a rule, have never appeared in court, or been personally served with notice, and where the time for appealing is very brief. The danger of injustice is intensified by the fact that probate orders and decrees are very often made really *ex parte*, by men not learned in the law.

Of course, this is no reason why all persons interested in the estate should not be bound by such orders and decrees as to all matters necessarily involved in them. But it is a reason why the doctrine of estoppel by judgment should not be extended beyond what is necessary. And I think that sufficient effect will be given to this decree of distribution by holding that it is conclusive merely that defendant was the devisee to whom, according to the terms of the will, the land should be assigned.

JEANETTE THOMAS v. FRANK A. SWANKE and Others.

January 23, 1899.

Nos. 11,417—(204).

Authority of Agent to Receive Payment of Mortgage.

Evidence considered, and *held*, that it does not sustain the finding of the trial court to the effect that the plaintiff's agents had actual authority to receive payment for her of a note and mortgage which they did not at the time have in their possession.

Action in the district court for Traverse county to foreclose a mortgage given to secure the payment of \$550. The defendant Keating pleaded payment, and prayed that the mortgage be discharged and satisfied of record. The cause was tried before C. L. Brown, J., without a jury, who ordered judgment in favor of defendant Keating. From an order denying a motion for a new trial, plaintiff appealed. Reversed.

Hahn, Belden & Hawley, for appellant.

Owen Morris, for respondents.

75	326
79	47
75	326
d82	184

START, C. J.

This was an action to foreclose a real-estate mortgage made by Frank A. Swanke and wife to the plaintiff to secure the payment of their note to her, dated March 24, 1891, and due in five years, with semiannual interest. The defense was payment.

The trial court found as a fact that on March 18, 1896, defendant Keating, the owner of the mortgaged premises, paid \$589.25 in full payment of the principal and interest of the mortgage debt to A. F. & L. E. Kelley, who were then the agents of the plaintiff and authorized to receive such payment for her; and, as a conclusion of law, that the defendant was entitled to judgment that the mortgage was paid, and that it be satisfied of record. The plaintiff appealed from an order denying her motion for a new trial.

The assignments of error present for our consideration two general questions: First. Did the trial court err in receiving evidence relating to the general course of business conducted by the Kelleys for Leander Thomas, the husband and agent of the plaintiff? Second. Was the evidence sufficient to support the finding that the Kelleys were the agents of the plaintiff and authorized to receive the payment for her at the time it was made?

1. The first question must be answered in the negative. The evidence tends to show that the husband was the agent of plaintiff, and had full authority from her to do as he saw fit in the matter of investing her money for her. He dealt extensively with the Kelleys as loan agents, and sent his wife's money to them, as he did his own, to be loaned for her. The evidence warrants the inference that he intended to and did confer upon the Kelleys the same authority as to investing and caring for his wife's money as he did with reference to his own. The evidence, then, as to the course of business between them in the management of his loans was competent and material for the purpose of showing the extent of the Kelleys' authority in the premises.

2. The serious question in this case is whether the finding, that the Kelleys were the agents of the plaintiff and authorized to receive the payment of the mortgage debt for her, is sustained by the evidence. At the outset we are confronted with the admitted fact that when the payment was made the note and mortgage were in

the possession of the plaintiff. This, and the further fact that the payment was made six days before the due day, are entitled to great weight in determining the question of the authority of the Kelleys in the premises, and cast upon the defendant the risk and burden of establishing the actual authority of the Kelleys. *Budd v. Broen*, supra, page 316.

Evidence was given on the trial of this case tending to show that Leander Thomas, the husband and agent of the plaintiff, commenced doing business with the Kelleys as loan agents in 1880, and so continued until his death, in 1895, during which time they made many loans for him, collecting interest and principal, and reloading the principal in a number of instances. They, on March 15, 1886, made a loan of \$550 for the plaintiff to a party by the name of Johnson, receiving a draft therefor on the 18th of the same month. This loan was managed by the husband, as he managed his own loans, and at the maturity of the Johnson loan the husband sent to the Kelleys the note and mortgage, with a release, with direction to reloan the principal. The plaintiff never had any correspondence with them. The Kelleys collected this loan, and reloaned the principal to Swanke, taking a real-estate mortgage to the plaintiff as security, which is the mortgage in question.

There was also evidence tending to show that the Kelleys sometimes collected interest on loans for Leander Thomas before receiving the coupons, and frequently the principal before receiving a satisfaction of the mortgage; also that they occasionally remitted interest before they collected it or received the coupons therefor; that such was the case as to one of plaintiff's coupons; and, further, that the plaintiff, after the death of her husband, assented to a statement by her daughter to one of the Kelleys in reference to the loans made by them for her and her husband to the effect that she wanted \$500 or \$600 paid, and the rest reloaned. This was contradicted by the plaintiff, who testified that she never authorized the Kelleys to collect either interest or principal for her unless the coupon or note was forwarded to them. In this she was corroborated by the daughter, who was the administratrix of her father's estate, and also managed plaintiff's affairs. The coupon due March 24, 1896,—the one paid by the defendant when he paid the principal,—was not

forwarded to the Kelleys until June 16. The alleged fact that the Kelleys often collected interest and principal for Leander Thomas without the coupon or satisfaction being first sent to them rests upon the testimony of one of the Kelleys. On his cross-examination he stated that he could not give the dates or the names of such transactions without referring to the account books of the firm, but by such reference he could do so. The examination on this point was not further pressed.

The evidence is undisputed that the defendant Keating, on March 18, 1896, called upon one of the Kelleys at their office, and stated that he wished to pay the mortgage, as he had purchased the land, and inquired if Kelley had the note and satisfaction. He was answered in the negative, with an explanation to the effect that frequently the papers did not come until after the payments were made, and, further, that the money was not to be sent to the owner, but was to be reloaned. Thereupon the defendant paid the Kelleys the full amount of the mortgage debt, for which they gave him a receipt in full payment of the mortgage, in which it was agreed that a release should be furnished.

The defendant, for some 10 years prior to this transaction, had frequently paid loans to them, but there was no evidence that the plaintiff or her husband was interested in any of such loans. The Kelleys never paid the money to the plaintiff, nor reloaned it for her. Now, the mere fact that the Kelleys made the loans for the plaintiff and her husband, and sometimes collected the interest without the coupons being first sent to them, does not warrant the conclusion that they were authorized to collect the principal of the loans before the securities were sent to them for collection. *Budd v. Broen*, supra.

There is no evidence in the record in this case tending to show an implied authority on the part of the Kelleys to collect such principal without the securities resulting from the course of dealing between Leander Thomas and the Kelleys as to the collection of such loans. It is true, Kelley testified that he did in some cases collect the principal of the loan without receiving a satisfaction of the mortgage, but he did not testify that he ever collected the principal before he received the securities.

Neither is there any evidence to show that Thomas, who was dead at the time of the trial, ever knew that the Kelleys ever assumed to collect the principal of any loan before receiving the securities or a satisfaction of the mortgage, from which a recognition and admission of their authority might be implied, as was the fact in the cases of *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213, and *General Convention C. M. v. Torkelson*, 73 Minn. 401, 76 N. W. 215, relied on by the defendant. Here is where the defense in this case breaks down. There was no evidence that Thomas knew that the Kelleys ever collected the principal without the securities, although counsel for the defendant seems to assert the contrary in his brief. He, however, refers us to no evidence to support the claim. We can discover no such evidence in the record; on the contrary, it appears from the letters of Leander Thomas to the Kelleys that it was his custom to forward the securities to them when he desired them to collect the principal of his loans.

The finding in question is not sustained by the evidence, and the order appealed from is reversed, and a new trial granted.

HANNORA LYTLE v. CHICAGO GREAT WESTERN RAILWAY
COMPANY and Another.

January 23, 1899.

Nos. 11,437—(227).

Res Judicata—Judgment Roll Evidence of Estoppel by Verdict.

Held, that the judgment and roll in a former action between the parties hereto were competent evidence in this case to establish an estoppel by verdict against the appellant as to the execution and validity of the assignment under which the plaintiff claims.

Assignment as Collateral Security—Finding Sustained by Evidence.

Evidence *held* sufficient to sustain the finding of the trial court to the effect that the assignment under which the appellant claims was made to secure a loan which has been paid.

Action in the municipal court of St. Paul to recover \$43.35, wages due from defendant railway company to one John McGraw, and as-

signed by said McGraw to plaintiff. The facts are stated in the opinion. From an order, Orr, J., denying a new trial, the intervenor, Clifford, appealed. Affirmed.

R. A. Walsh, for appellant.

S. C. Olmstead, for respondent.

START, C. J.

The subject-matter of this action is the sum of \$43.35, due from the railway company to John McGraw, one of its employees, for his services for the month of September, 1896. The plaintiff and intervenor respectively claimed to be entitled to the money by virtue of an assignment from McGraw. The action was originally brought against the railway company alone, and Clifford intervened, claiming the money. The railway company paid the money into court, and the litigation thereafter was between Lytle and Clifford. The latter claimed the money by virtue of an assignment executed to him by McGraw on March 15, 1895, purporting to assign all money which was due or to become due for the services of McGraw for the railway company during the years 1895 and 1896. The former claimed under an assignment from McGraw to E. A. Hunt, executed December 14, 1895, purporting to assign McGraw's wages for the months of August and September, 1896. On October 13, 1897, Hunt assigned the claim to the plaintiff.

The execution and validity of the assignment under which the plaintiff claimed were in issue, and the issue as to the one under which the intervenor claimed was whether it was given as collateral security for a loan of money which had been paid. The trial court found for the plaintiff on both issues, and the intervenor appealed from an order denying his motion for a new trial.

His first assignment of error is that the trial court erred in receiving in evidence the judgment roll in a former action between the same parties, in which they litigated their respective claims to the wages of McGraw for August, 1896, the plaintiff claiming them under the identical assignment by virtue of which she claims the money in controversy in this case. The plaintiff had judgment in the former action, and the execution and validity of the assignment

here in question were directly involved and litigated in that case, and determined adversely to the intervenor.

The judgment and judgment roll were competent and material evidence for the purpose of establishing the execution and validity of the assignment under which the plaintiff claims in this case. The finding on this issue in the former action operates as an estoppel by verdict against the intervenor in this case, and is conclusive upon him as to the execution and validity of the assignment.

This also disposes of the third and fourth assignments of error, to the effect that the court erred in finding that the order assigning the wages in question was duly executed. The second alleged error is to the effect that the court erred in finding that the assignment under which the intervenor claims was given as collateral security for a loan which was paid before the commencement of this action. The evidence sustains this finding. The fifth assignment of error is too indefinite to be available.

Order affirmed.

MINNIE J. THIELEN v. S. H. RANDALL.

January 24, 1899.

Nos. 11,430—(255).

Action to Cancel Mortgage—Want of Consideration—Error to Exclude Evidence.

Certain loan agents received the money of defendant, to be loaned for him. H. applied for a loan. They agreed to loan him this money, and procured him to sign a note and mortgage to defendant for the same. They sent the note and mortgage to defendant, but never paid the money over to H. In an action to cancel the note and mortgage on the ground that they were never delivered and were without consideration, *held*, it was error to exclude evidence offered by defendant to prove that the agents were also acting as the agents of one T. in another transaction, and that H. directed the money to be applied by such agents for the benefit of T. in that transaction, as this evidence would tend to prove that the agents had ceased to hold the money as the agents of defendant, and held it thereafter as the agents of T., by H.'s direction.

Harmless Error.

But *held*, the error became error without prejudice, by reason of subsequent testimony, which proved conclusively that the agents had converted the money to their own use before H. applied for the loan.

From an order of the district court for Hennepin county, Simpson, J., denying a motion for a new trial, defendant appealed. Affirmed.

Fred W. Reed, for appellant.

George R. Smith and *James D. Shearer*, for respondent.

CANTY, J.

This action was brought to restrain the foreclosure of a mortgage from plaintiff to defendant, and to cancel said mortgage, on the ground that it was never delivered, and that there never was any consideration for it. On the trial the court found for plaintiff, and, from an order denying a new trial, defendant appeals.

One Howling applied to the firm of A. F. & L. E. Kelley, loan agents at Minneapolis, for a loan of \$1,000 on a certain city lot owned by Howling. The Kelleys agreed to procure the loan for him from defendant, and, at their request, Howling signed a promissory note to defendant for \$1,000, and also signed the mortgage here in question, by the terms of which he mortgaged said lot to defendant, to secure said note. The Kelleys put the mortgage on record, and, after it was recorded, sent it and the note to defendant, at his residence in Massachusetts, but never paid over the money agreed to be loaned, or any part of it.

Howling continued to call at Kelleys' office every few days for several months, to see if they were ready to complete the making of the loan; but they put him off with one excuse or another, until they made an assignment in insolvency for the benefit of their creditors. Thereafter defendant proceeded to foreclose the mortgage under the power of sale therein contained. In the meantime Howling had conveyed the lot to plaintiff.

The Kelleys had acted as agents for defendant for many years in loaning his money. A few weeks before Howling applied for this loan, they collected the money due on two of defendant's loans, amounting to \$1,000, and retained it in their hands to loan it again

for him. When the note and mortgage signed by Howling was sent by the Kelleys to defendant, they represented to him that it was taken to secure a loan which they had made of said \$1,000.

Defendant offered to prove that, at the time Howling applied for the loan, his son-in-law, one John Thielen, was the owner of four other lots and the houses thereon, all of which were incumbered with a mortgage for \$6,000, and that Thielen resided in one of the houses on one of these lots; that, shortly prior to this time, he entered into an agreement with the Kelleys, whereby they agreed to pay all the taxes due on these lots, to procure for him a release from this mortgage of the lot on which he resided, and whereby he agreed to execute to them a first mortgage on that lot for \$1,500, a second mortgage on it for \$375, pay them in cash \$1,000, and convey the other three lots to them; that, in order to obtain the \$1,000 in cash to pay to the Kelleys, Thielen procured Howling to apply to the Kelleys for the loan on his lot, and Howling directed them to apply the \$1,000 to be loaned to him, for Thielen's benefit in carrying out the deal between him and them.

The trial court refused to permit defendant to prove this offer by the cross-examination of plaintiff's witnesses. Defendant proved a part of the offer by evidence given on the defense, and the court refused to permit him to prove the rest of the offer at all. In our opinion, the court erred in all of these rulings.

There was no consideration for the Howling mortgage, unless defendant paid over the money agreed to be loaned. In fact, the mortgage could not be considered as delivered until the money was so paid over, as the delivery of the mortgage and the paying over of the money loaned were intended to be contemporaneous, and one was conditioned on the other. If the Kelleys acted in no capacity except as agent for defendant, then the money to be loaned would not be paid over until they actually paid it to Howling or to Thielen, to whom Howling admits that he directed it to be paid. But if the Kelleys were acting also as the agent of Thielen to disburse the money for his benefit, and Howling had directed it to be disbursed for Thielen's benefit, then those facts would tend to prove that the Kelleys had ceased to hold the money as the agents of defendant, and held it thereafter as the agent of Thielen, by direc-

tion of Howling. But, by reason of evidence which was subsequently introduced, these errors of the court became error without prejudice.

It was conclusively proved that, when the Kelleys received the \$1,000 paid on the former loans made by defendant, they deposited the money to their credit in the bank, in their account therein. This account had already been overdrawn, was overdrawn at the time Howling applied for the loan, and continued thereafter to be overdrawn until the time the Kelleys made the assignment for the benefit of their creditors. Then the Kelleys converted this money to their own use, by paying it to the bank on their indebtedness to it, and therefore they never could have received it or held it as the agents of either Howling or Thielen.

This disposes of the case, and the order appealed from is affirmed.

NORTHWESTERN IMPROVEMENT & BOOM COMPANY v. WILLIAM O'BRIEN.

January 24, 1899.

Nos. 11,460—(253).

Corporation—G. S. 1894, § 2633—Power to Drive Logs not Incidental to Power to Improve Stream for Driving Logs.

Held, a corporation attempted to be organized under G. S. 1894, § 2633, to improve a stream for driving logs, but which is not empowered by its charter to drive or handle logs, cannot collect the tolls provided for in that section. *Held*, further, the power to drive or handle logs is not incidental to the power to improve the stream.

Same—Improvement of Part of Stream.

In order to entitle a corporation organized under that section to collect toll, it is not necessary that it take possession of or improve the whole stream, or all thereof not improved by some one else; it is only necessary that such corporation take possession of "a considerable portion thereof."

Action in the district court for Ramsey county to recover \$8,700 as tolls for the use of certain improvements upon Kettle river, whereby the driving, during the years 1892, 1893 and 1894, of de-

fendant's logs was alleged to have been facilitated. From an order, O. B. Lewis, J., sustaining defendant's demurrer to the complaint, plaintiff appealed. Affirmed.

Clapp & Macartney, for appellant.

The general proposition as to the right of a corporation to do incidental business is fairly well established by the courts. *Smith v. Library Board*, 58 Minn. 108; *Cowling v. Zenith Iron Co.*, 65 Minn. 263; *Central Trust Co. v. Columbus, H. V. & T. Ry. Co.*, 87 Fed. 815.

J. N. Searles, for respondent.

The improvement of a stream by constructing, maintaining and operating therein the various structures mentioned in G. S. 1894, § 2633, is a business entirely independent of, and distinct from, the business of navigating the stream for log-driving purposes. See *New Orleans v. Ocean*, 28 La. An. 173; *Bangor v. Whiting*, 29 Me. 123. A corporation formed under a general statute cannot assume a larger power than the statute confers, by merely declaring in its articles of association that it possesses them. 5 *Thompson, Corp.* § 5996. The right to collect a toll is a privilege not enjoyed by the people in general, and is consequently a franchise which is to be construed most favorably to the public, where there exists a reasonable doubt as to the extent of the privileges conferred. See 3 *Thompson, Corp.* § 4345.

CANTY, J.

This is an appeal from an order sustaining a demurrer to the complaint on the ground that it does not state a cause of action. The complaint alleges: That during the times therein stated plaintiff was, and still is, a corporation organized

"For the purpose of improving the navigation of Kettle river for logs, lumber and timber from the north line of section twenty-six, in township forty-eight north, of range twenty west, to the mouth of said river, and a like improvement of Pine river, one of the tributaries of said Kettle river, from its source to the mouth thereof, including the building of such piers, booms, side rolling, sluicing and flooding dams, and other structures as may be necessary or advisable, in order to facilitate the driving, floating, holding, handling and assorting of logs, timber and lumber upon said Kettle river

and Pine river between the points hereinbefore mentioned; also the clearing and straightening of the channel of said river between the points aforesaid, the booming or closing of sloughs adjacent thereto, or the clearing out or so improving the channel in any such slough as to render the same navigable, so as to improve and facilitate the navigation of said rivers.

"And that under and pursuant to its said organization this plaintiff, prior to the 1st day of April, A. D. 1892, had taken prior possession of that portion of said Kettle river between the north line of section twenty-six, in township forty-eight north, of range twenty west, to the mouth of said Kettle river, a distance of about seventy-five miles; and that at the time of taking such possession no other person or corporation was in possession thereof, or had erected or was in possession of any dams or other improvements upon said Kettle river between the points above described; and that at the time this plaintiff so took possession of said portion of said river above described, such portion of said river did require dams and improvements for the purpose of driving logs therein; and thereupon and prior to the 1st day of April, 1892, this plaintiff entered upon said Kettle river (between the points above described), and built thereon two certain dams, and had, by means of said dams and other improvements erected by it upon said river, so improved the navigation of said river as to render the driving of logs thereon reasonably practicable and certain."

It is further alleged that during the driving season of 1892 defendant banked twenty-five million feet of saw logs above and below one of said dams,

"And that the said dams and other improvements so erected upon said river by this plaintiff were so managed, controlled and operated by this plaintiff during said year 1892 as to facilitate and aid in the driving of said logs, and to render the driving thereof in said year reasonably practicable and certain; and that a reasonable and just toll and compensation to this plaintiff for the use of said dam and improvements upon said river in said year 1892 is the sum of ten cents per thousand feet, board measure, for each and every thousand feet so owned or driven by said defendant upon said river in said year."

There is also alleged a second cause of action, similar in form, covering the driving season of 1893, and a third cause of action, covering the driving season of 1894. There are two points made against this complaint.

1. Evidently this corporation was organized, or attempted to be

organized, under G. S. 1894, § 2633, which, so far as here material, reads as follows:

"Any corporation formed under this title in whole or in part for the improvement of any stream and driving logs therein, or for holding or handling logs therein, which shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose, shall have power to improve such streams and its tributaries by clearing and straightening the channels thereof, closing sloughs, erecting sluiceways, booms of all kinds, side rolling, sluicing and flooding dams or otherwise if necessary. * * * Every such corporation which shall so improve a stream and so keep in repair, and operate its works so as to render driving logs thereon reasonably practicable and certain, may charge and collect reasonable and uniform tolls upon all logs, lumber and timber driven, sluiced or floated on the same, and may take possession of all logs put into such stream or upon rollways, so as to impede the drive when the owners thereof or their agents shall not have come upon the stream adequately provided with men, teams and tools for breaking the rollways and driving such logs in season for making a thorough drive down such stream without hindering the main drive; and shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream, or down such stream so far as their improvements may extend, and charge and collect therefor of the owner or party controlling said logs and timber, reasonable charges and expenses for such services."

It will be observed that this section requires the corporation to organize

"For the improvement of any stream and driving logs therein, or for holding or handling logs therein,"

While, as alleged in the complaint, this corporation was organized

"For the purpose of improving the navigation of Kettle river for logs, lumber and timber, * * * in order to facilitate the driving, floating, holding, handling and assorting of logs, timber and lumber upon said Kettle river."

The point made is that it is nowhere alleged that the corporation was organized "for driving logs therein," or for "handling logs therein," and that being organized "to facilitate the driving, floating, holding, handling and assorting of logs" is not sufficient; that,

in order to have the right to collect tolls, the corporation must comply with the statute, and must, by its charter, have the power to drive or handle the logs on the improved portion of the river; and that it is not sufficient that such corporation has, by its charter, the power "to facilitate" the driving or handling of logs on such portion.

Said section 2633 provides that the corporation organized under that section "may take possession of all logs put into such stream," where the owners of the logs are not sufficiently equipped to drive or handle them,

"And shall also, at the request of the owner of any logs and timber put into said streams, take charge of the same, and drive the same down and out of such stream."

Then it is plain that, in order to organize a corporation under this section, the corporation must be given power to drive or handle logs as well as to make the improvements in the river. As a general rule, such improvements are made in portions of the river where, by reason of obstacles in the river, or otherwise, there is not sufficient water to float logs; and in order to handle the logs to the best advantage, and give every one a chance to bring his logs down the river, it is usually necessary that he who controls the flow of water and the use of the improvements should also drive or handle the logs.

Thus the legislature had a purpose in requiring the corporation to have the power and ability to drive the logs, and to be ready at all times during the driving season to do so. But, in our opinion, the power given by the charter to improve the river in order to facilitate driving or handling logs does not give power to do the driving or handling. The latter power is not incidental to the former. See *Bangor v. Whiting*, 29 Me. 123. Such a franchise as a right to collect tolls on a public river is strictly construed in favor of the public. Sec 4 Thompson, Corp. § 5345. Then we are of the opinion that it does not appear that the statute has been complied with so as to enable plaintiff to collect tolls.

The next section of the statute (section 2634) provides:

"The provisions of this act shall apply as well to corporations

heretofore organized for the purposes specified in section two of this act as to those hereafter organized for such purpose."

Appellant contends that by the terms of this section, a corporation organized under sections 2474-2480, and also a corporation organized under section 2592, to improve a stream for "slack-water or other navigation upon any water-course, bay or lake," would be authorized to collect tolls under section 2633. In our opinion, neither sections 2474-2480 nor section 2592 apply to this case.

Section 2474 authorizes a person licensed by the county commissioners to charge toll when he has possession or control of both banks of the river, and has made such improvements. The corporation organized under section 2592 is not authorized to charge toll at all. Neither of these sections requires the corporation organized under it to have power to drive or handle logs, while the corporation referred to in section 2634 must have such power. True, by the terms of section 2634, it is not necessary that the corporation be one that was organized under section 2633, if it was organized before April 24, 1889, the date of the passage of those two sections, and was organized for the improvement of the stream and the driving or handling of logs.

It does not appear by the complaint that the plaintiff comes within all of these conditions. Whether or not, if appellant had, in fact, always complied with the provisions of section 2633 as to driving or handling logs, it would be a de facto corporation exercising all the powers of that section, we need not consider. The question is not before us.

2. Under the wording of section 2633 we cannot hold that, as a condition precedent to the right to collect toll, it is necessary that the corporation take possession of the whole stream, or all thereof needing improvement which has not been improved by some one else. The statute simply requires that the corporation

"Shall have taken prior possession of such stream, or any considerable portion thereof, upon which portion no other person or corporation has erected any dams or other improvements, and which may have need of improvement for that purpose."

This disposes of the case.

Order affirmed.

AMOS BENSON v. EDWARD N. NASH.

January 24, 1890.

Nos. 11,462—(257).

Fraudulent Conveyance—Bill of Sale—Verdict Sustained by Evidence.

Held, the verdict finding that a sale of personal property was made with intent to hinder, delay and defraud the creditors of the vendor, and that the purchaser at the time knew of that intent, is sustained by the evidence.

Failure to Investigate Title—Evidence of Bad Faith.

For the purpose of showing want of good faith in the purchaser, *held*, it was competent to show that he purchased without searching the records or making any investigation as to the character of the title, and that there was of record at the time a chattel mortgage on the property, of which he claims he then had no knowledge.

Appeal by plaintiff from an order of the district court for Grant county, C. L. Brown, J., denying a motion for a new trial. *Affirmed*.

Andrew O. Ofsthun, for appellant.

T. & M. Casey, for respondent.

CANTY, J.

This is an action in replevin, brought against the sheriff of Grant county, to recover certain saloon furniture and fixtures, and a stock of liquors and cigars, which he had levied on as the property of one Olouse Thompson, under a writ of attachment issued against the property of Thompson in an action brought against him by George Benz & Sons. On the trial the jury returned a verdict for defendant, and, from an order denying a new trial, plaintiff appeals.

Appellant contends that the evidence does not sustain the verdict. For some time prior to November 2, 1897, Thompson ran a saloon at the village of Barrett, in that county; and on that day he made a bill of sale of the saloon furniture and fixtures and stock of goods to plaintiff, who took possession, and continued the business. On the trial, respondent sought to prove that Thompson made the transfer with intent to hinder, delay and defraud his

creditors, and that plaintiff at the time had knowledge of that intent.

The evidence tends to prove that plaintiff had no previous experience in the saloon business, knew nothing about the value of the goods which he was buying, and made no inquiry and sought no information as to their value, except such as he obtained from Thompson himself, and that no inventory of the goods was taken at the time of the sale. He made no examination to determine whether or not the property was incumbered, although there was at this time a chattel mortgage on the fixtures for \$483.50, which mortgage was filed of record. Although he made no search for incumbrances, he took the precaution to file his bill of sale in the office where this chattel mortgage was of record. Plaintiff paid no cash for the property. He agreed to pay \$1,200 therefor, for which he at the time executed his two promissory notes, for \$600 each,—one due April 1, and the other October 1, 1898. He gave no security for the payment of these notes, although he had at the time very little property other than what was being transferred to him. Such other property consisted of 20 acres of land, worth \$200 or \$300, and three horses, worth \$125. These are his own estimates of the value of his property. It was admitted on the trial that Thompson was insolvent at the time of the sale, but plaintiff testified that he did not then know that fact, or know that Thompson was then in debt.

We are of the opinion that the evidence disclosed several badges of fraud, and that the jury were warranted in finding a verdict for defendant.

We are of the opinion that the court did not err in receiving in evidence the chattel mortgage in question. The existence of this chattel mortgage, the fact that it was of record, and the failure of plaintiff to search the record for incumbrances, or learn that there was such an incumbrance on the fixtures, tended to throw light on the question whether the purchase was in good faith, or merely a pretense. A person who is purchasing for his own use and benefit is likely to be more vigilant and careful in investigating the character of the title or interest which he is acquiring than one who is making a sham purchase of property, which he intends to hold for

the use and benefit of the vendor. Whether plaintiff's failure to make a proper investigation resulted from his ignorance or inexperience while acting in good faith, or resulted from the fact that the purchase was merely a sham, was a question for the jury on all the evidence. This disposes of the case.

Order affirmed.

JAMES S. O'BRIEN v. ST. CROIX BOOM CORPORATION.

January 24, 1899.

Nos. 11,477—(245).

Title of Act—Constitution—Sp. Laws 1870, c. 116.

Held, Sp. Laws 1870, c. 116, is not unconstitutional, as to section 23 thereof, because the subject of that section is not expressed in the title of the act, or because the act embraces more than one subject.

Action in the district court for Washington county by plaintiff as surveyor general of logs and lumber for the first district of Minnesota, to recover \$15,554.20, and interest, for scaling logs. The court, Crosby, J., directed a verdict in favor of plaintiff for \$6,221.68, and interest. From an order denying a motion for a new trial, plaintiff appealed. Affirmed.

J. N. Castle, for appellant.

Sp. Laws 1870, c. 116, is in conflict with Const. art. 4, § 27. The object of this provision is to prevent the combination in one act of subjects which ought to be separately considered, and to advise the legislature and the public of impending legislation. *Ryerson v. Utley*, 16 Mich. 269; *Sun v. Mayor*, 4 Seld. 241, 253; *Mewherter v. Price*, 11 Ind. 199; *State v. County*, 7 Iowa, 186; *Mayor v. State*, 4 Ga. 26; *State v. Ah Sam*, 15 Nev. 27; *Davis v. State*, 7 Md. 151; *City v. Tiefel*, 42 Mo. 578; *People v. Institute*, 71 Ill. 229; *Albrecht v. State*, 81 Tex. App. 216; *Fletcher v. Oliver*, 25 Ark. 289, 299; *Ives v. Norris*, 13 Neb. 252; *Weaver v. Lapsley*, 43 Ala. 224, 229; *Tuskaloosa v. Olmstead*, 41 Ala. 9; *Callaghan v. Chipman*, 59 Mich. 610; *People v. Commissioners*, 53 Barb. 70; *White v. City*, 5 Neb.

505; *People v. Mahoney*, 13 Mich. 481, 494; *Cooley*, Const. Lim. 143; 23 Am. & Eng. Enc. 229; *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 79. The provision is mandatory. 23 Am. & Eng. Enc. 230; *Cooley*, Const. Lim. 150; *Sjoberg v. Security S. & L. Assn.*, 73 Minn. 203.

In so far as Sp. Laws 1870, c. 116, § 23, undertakes to fix the fees of the surveyor general, it is void. The subject is not embraced in the title, and the title is misleading. *State v. Porter*, 53 Minn. 279; *State v. Kinsella*, 14 Minn. 395 (524); *State v. Smith*, 35 Minn. 257; *State v. Murray*, 41 Minn. 123; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 392 (515); *Ridge v. City*, 124 Pa. St. 219; *Grubbs v. State*, 24 Ind. 295; *Bryan v. Board*, 90 Ky. 322; *People v. Allen*, 42 N. Y. 404; *Wulfange v. McCollom*, 83 Ky. 361; *Brown v. State*, 79 Ga. 324; *Holmberg v. Hauck*, 16 Neb. 337; *People v. Fleming*, 7 Colo. 230; *Rogers v. Manufacturers*, 109 Pa. St. 109; *Sewickley v. Sholes*, 118 Pa. St. 165; *Lane v. State*, 49 N. J. L. 673; *Miller v. Edwards*, 8 Colo. 528; *State v. Silver*, 9 Nev. 227; *Eaton v. Walker*, 76 Mich. 579; *Anderson v. Whatcom*, 15 Wash. 47.

Clapp & Macartney, for respondent.

CANTY, J.

During the times hereinafter stated, plaintiff was the surveyor general of logs and lumber in the first, or Stillwater, district. The defendant is a chartered boom company, and maintains booms, and booms and rafts logs, on the St. Croix river, between the head of Lake St. Croix and Titcomb's Landing. Defendant handles all the logs which pass down the river, and in the year 1897 plaintiff scaled all of these logs passing through the booms during that year, amounting to more than 311,000,000 feet. Plaintiff claims that, according to law, he is entitled to five cents per thousand feet for scaling these logs; and defendant claims that he is entitled to only two cents per thousand feet. This is the controversy in this action. At the close of the evidence, the trial court, on defendant's motion, ordered a verdict according to defendant's contention. From an order denying a new trial, plaintiff appeals.

Defendant was chartered by Laws 1856, c. 141, entitled "An act to organize the St. Croix Boom Corporation." The charter was

amended by Sp. Laws 1870, c. 116, which added section 23 to the act. This section reads as follows:

"All logs or timber, before the same shall be deemed ready for delivery as provided herein, shall be surveyed by the surveyor general of the first district or such of his deputies as said corporation may select, for which services said corporation shall be liable to pay not to exceed the sum of two cents per thousand feet for all logs or timber delivered at their booms."

The act of 1856 provided that plaintiff should receive a certain sum per thousand feet of logs for rafting, booming, etc., but did not state who should scale the logs in order to ascertain the amount due plaintiff, and made no reference to the surveyor general. Plaintiff contends that said section 23 of the act of 1870 is unconstitutional and void, because the subject of that section is not expressed in its title, and that, therefore, plaintiff is entitled to demand for its service five cents per thousand feet, under G. S. 1894, § 2402. The act of 1870 is entitled "An act to amend an act entitled 'An act to organize the Saint Croix Boom Corporation,' passed and approved February 27, 1856." While the act of 1856 provided for scaling the logs, it was somewhat defective in failing to designate who should scale them. Section 23 of the act of 1870 remedied this defect, and the scaling provided for in that section is intended merely for the purpose of ascertaining the compensation due the defendant. Then the subject of section 23 is cognate to the subject of the act of 1856, and the act is not, by reason of section 23, repugnant to section 27, art. 4, of the constitution. See *State v. Madson*, 43 Minn. 438, 45 N. W. 856. This disposes of the case.

Order affirmed.

ANNA V. LYNN v. ANNIE HANSON and Others.¹

January 25, 1899.

Nos. 11,241—(65).

Agents Authorized to Receive Payment of Mortgage.

Held, that upon the facts in this case the note and mortgage in controversy must be deemed paid. *Hare v. Bailey*, 73 Minn. 409, and *General Convention C. M. v. Torkelson*, 73 Minn. 401, followed.

Action in the district court for Hennepin county against Annie Hanson and John Hanson, her husband, and H. W. Thompson, as administrator with the will annexed of the estate of Francis Parks, deceased. The complaint alleged, among other things, that defendants Hanson executed to plaintiff a mortgage to secure a loan of \$1,500, evidenced by one note for \$500 and by another note for \$1,000; and that defendant Thompson, as administrator, claimed some right and interest in the mortgaged premises, but that his lien was inferior to that of plaintiff's mortgage. The complaint prayed for judgment of foreclosure and for a deficiency judgment against the Hansons. The court, Johnson, J., found the facts as

¹ANNA V. LYNN v. JOSEPH KING and Others.

January 25, 1899.

Nos. 11,240—(64).

Appeal by defendant H. W. Thompson, as administrator with the will annexed of the estate of Francis Parks, deceased, from a judgment of the district court for Hennepin county, entered pursuant to the findings and order of Johnson, J. Reversed.

A. D. Keyes, for appellant.

Jones & Babcock and *John B. Atwater*, for respondent Anna V. Lynn.

BUCK, J.

There is but one paper book in this case and that of *Lynn v. Hanson*, herewith decided adversely to the plaintiff. The cases were argued at the same time, and upon substantially the same state of facts. Following the ruling in the *Hanson* case, the note in controversy must be deemed paid, the mortgage satisfied, the judgment reversed and new trial ordered.

stated in the opinion, and as conclusion of law found that plaintiff was entitled to judgment against defendants Hanson for \$500 with interest from July 8, 1896, and to a judgment of foreclosure, and to judgment against defendant Thompson that he take nothing by the action. From a judgment entered pursuant to the findings, defendant Thompson appealed. Reversed.

A. D. Keyes, for appellant.

Jones & Babcock and *John B. Atwater*, for respondent Anna V. Lynn.

BUCK, J.

Annie Hanson, one of the defendants, borrowed of the plaintiff, Lynn, \$1,500, giving one note of \$500, payable in two years, and one of \$1,000, payable in five years, each dated June 10, 1891, drawing interest at the rate of 7 per cent. per annum, and secured the payment thereof by mortgage on a certain lot in the city of Minneapolis. The defendant John Hanson, her husband, joined in the execution of the mortgage. This mortgage was duly recorded. The first note was paid when due, and the other note and mortgage were sent by the plaintiff, Lynn, to the firm of A. F. & L. E. Kelley, of Minneapolis, for collection, this being the firm by whom the loan was made in the first instance. This note, including six months' interest thereon, was then due, and the Hansons then paid the Kelleys, on behalf of plaintiff, the sum of \$535, and they surrendered the note and mortgage to the Hansons.

While the trial court found that the Hansons only paid on said note and mortgage the said sum of \$535, that finding must be construed in the light of the evidence in the record, from which it appears that the Kelleys received the Hanson note and mortgage from plaintiff with instructions to collect the amount due thereon and reloan the same. The Hansons could not pay the amount in full, and when they paid the \$535 on the note they made application to the Kelleys for a loan of \$500 to pay the balance, and the Kelleys thereupon loaned them that amount from the Parks estate, then in their hands for loaning, and to this end the Hansons at the same time executed to the Parks estate their note therefor, and secured the same by a mortgage on the real estate described in the

complaint, and the Kelleys then credited plaintiff with \$1,000 on their books, and charged the \$500 to the Parks estate, and then surrendered the note and mortgage to the Hansons as paid in full. This transaction was treated and understood by the Hansons and the Kelleys as a payment of the Hanson note and mortgage, although there was an item of \$15 placed on the Kelleys' books to credit of commissions, \$1 to interest and discount, \$516 to cash, and \$1,000 to plaintiff. It is claimed that by this transaction the \$532 paid to the Kelleys and the \$500 borrowed of the Parks estate paid the \$1,000 note and the \$31 interest coupon, and left \$1, which was credited to interest and discount in the Kelleys' account with plaintiff.

It also appears from the record that, several years prior to this transaction, at two or three different times plaintiff had sent to one or both of the Kelleys money aggregating some \$20,000, to be loaned, collected and reloaned, and in doing so the Kelleys opened an account with the plaintiff, which showed a statement of moneys loaned, collected and reloaned from time to time, and a statement thereof rendered to the plaintiff as the transactions took place. These collections were not remitted to plaintiff, but were reloaned by the Kelleys or one of them. Plaintiff thus had knowledge of the manner in which the Kelleys were doing business for her, for many years prior to the transaction in controversy.

There can be no doubt of the authority of the Kelleys to collect the note and mortgage of the Hansons and to reloan the money so collected. They had possession of such note and mortgage, and express authority to transact the business, and the question arises as to whether the manner of reloaning the money of the Parks estate, crediting the amount thus collected on the Kelleys' books to plaintiff, operated as payment of the Hanson note and mortgage. Following the rule laid down in *Hare v. Bailey*, 73 Minn. 409, 76 N. W. 213, and *General Convention C. M. v. Torkelson*, 73 Minn. 401, 76 N. W. 215, the question must be answered in the affirmative. The Kelleys became insolvent September 12, 1896. It should be stated that the appellant Thompson is the administrator with the will annexed of the estate of Francis Parks.

Our conclusion is that the Hanson note must be deemed paid

and the mortgage satisfied, the judgment reversed, and new trial ordered. It is so ordered.

CARL PARK v. ELECTRIC THERMOSTAT COMPANY.

January 25, 1890.

Nos. 11,273—(167).

New Trial—Payment of Costs.

There is neither a statute nor a rule of court requiring the payment of costs as a condition of granting a new trial on the merits; and hence it was not error for the trial court to refuse imposing such a condition in this case.

Same—Discretion of Court.

Held, further, that the trial court did not abuse its discretion in granting a second new trial.

Appeal by plaintiff from an order of the district court for Hennepin county, Lancaster, J., granting a motion for a new trial. Affirmed.

James E. Trask, for appellant.

Wilson & Van Derlip, for respondent.

BUCK, J.

This action was brought to recover from the defendant the balance claimed to be due for services rendered. There have been two jury trials of this action, the first one resulting in a verdict for the plaintiff in the sum of \$364.93. Upon the defendant's motion, the court set aside this verdict, and ordered a new trial, but did not state the ground upon which such order was based. Subsequently a second trial was had, and resulted in a verdict for the plaintiff for \$536.81. The court also set aside this verdict, upon motion of the defendant, but the grounds for doing so are not stated in the order. In the memorandum attached to the order, the court states that the verdict is so manifestly against the weight of evidence that a new trial ought to be granted.

In Wisconsin it is held that, in the absence of any stated ground for the order, the presumption is that it is made on the ground

that the verdict is against the weight of evidence; that is, on the merits. *Cameron v. Mount*, 86 Wis. 477, 56 N. W. 1094. Assuming, without deciding, that such is the correct rule, still it is not true that this ended the discretion of the trial court, and that it had no right to grant a second new trial, unless there was an entire absence of evidence to support the verdict. The rule in *Hicks v. Stone*, 13 Minn. 398 (434), would still apply, limited and modified by the fact that there had been two concurring verdicts in favor of the plaintiff. The trial judge might be justified in the exercise of his discretion in granting one new trial on the merits when to grant a second trial on the same evidence would be an abuse of discretion. The force to be given to the fact that there had been a previous verdict, also in favor of the plaintiff, is greatly reduced by the fact that the last verdict is over 45 per cent. greater than the first; but, so far from the manifest and palpable weight of the evidence being in favor of the last verdict, the preponderance of evidence was against it, at least as to the amount.

There is neither a statute nor rule of court requiring the payment of costs as a condition of granting a new trial on the merits; hence it cannot be held that the court erred in not imposing such a condition in this case.

Order affirmed.

CAROLINE H. SVANBURG v. OSMAN FOSSEEN.

January 25, 1899.

Nos. 11,353—(220).

Specific Performance of Oral Contract to Convey Entire Property at Death—Personal Services.

Where, in a parol agreement for the purchase of real estate, the consideration consists of services to be rendered which are of such a peculiar character that it is impossible to estimate the value to the vendor by a pecuniary standard, and neither party intended so to measure them, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol; and this rule is especially applicable where, in addition to such services, the vendee, at the

75	850
81	430
s 48	427
52	277n
75	350
s 82	42

request of the vendor, subsequently sold real estate at a sacrifice, and paid the proceeds to the vendor, as further consideration, and where, after the full performance of the services, it is out of the power of the court to restore the vendee to the situation in which he was before the contract was made, or to compensate him in damages.

Same—Jurisdiction of Probate Court.

The probate court has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate.

Same—Husband and Wife—Joint and Separate Property.

A contract on the part of husband and wife to convey by deed or will all their property, both real and personal, and a subsequent agreement on their part and that of each of them to make such conveyance, to take effect on their demise, would include all the property which they owned jointly or separately.

Defect of Parties not Reached by Demurrer.

Where the demurrer is one as to want of jurisdiction and insufficiency of facts in the complaint to constitute a cause of action, it does not reach an objection that there is a defect of parties either of nonjoinder or misjoinder.

Appeal by defendant, as executor of the will of James Fosseen, deceased, from an order of the district court for Hennepin county, Harrison, J., overruling a demurrer to the complaint. Affirmed.

O. Mosness and M. L. Fosseen, for appellant.

Plaintiff is barred by the decision of the probate court upon the validity of the will. *State v. McGlynn*, 20 Cal. 234; *Deslonde v. Darrington's Heirs*, 29 Ala. 92, 95; *Bogardus v. Clark*, 4 Paige, 623; *Woodruff v. Taylor*, 20 Vt. 65; *Ballow v. Hudson*, 13 Grat. 672, 682; *Tompkins v. Tompkins*, 1 Story, 547, 557; *Broderick's Will*, 21 Wall. 503; 3 *Redfield, Wills*, 56. The alleged agreements are within the statute of frauds. *Townsend v. Fenton*, 30 Minn. 528; *Austin v. Davis*, 128 Ind. 472, 105 Ind. 522; *Benders v. Bender*, 37 Pa. St. 419; *Gorham v. Dodge*, 122 Ill. 528; *Parker v. Heaton*, 55 Ind. 1; *Pond v. Sheean*, 132 Ill. 312; *Moore v. Small*, 19 Pa. St. 461; *Crabill v. Marsh*, 38 Oh. St. 331; *Mauck v. Melton*, 64 Ind. 414; *Ham v. Goodrich*, 37 N. H. 185; *Smith v. Smith*, 28 N. J. L. 208; *Shahan v. Swan*, 48 Oh. St. 25. See *Swash v. Sharpstein*, 14 Wash. 426; *Wallace v. Long*, 105 Ind. 522; *Temple v. Johnson*, 71 Ill. 13; *Ackermon v.*

Fisher, 57 Pa. St. 457; Purcell v. Miner, 4 Wall. 513; Williams v. Morris, 95 U. S. 444; De Moss v. Robinson, 46 Mich. 62; Bresnahan v. Bresnahan, 71 Minn. 1; Maddison v. Alderson, L. R. 8 App. Cas. 467; Campbell v. McKerricher, 6 Ont. Rep. 85. The second agreement embraces at most only such property as was jointly owned by James and Mary Anna Fosseen, and which was possessed by the survivor at the time of his death. No such property is shown. The action cannot be maintained against the executor in his capacity as such alone. The legatees are necessary parties. If an action lies, plaintiff's sisters must be joined as plaintiffs. The action does not lie, for the reason that the probate court has exclusive jurisdiction of all ex contractu obligations of the testator. Hill v. Nichols, 47 Minn. 382. If plaintiff had a right to recover what she alleges she paid to the Fosseens, she cannot so recover in an action in which she demands specific performance. Horn v. Ludington, 32 Wis. 73.

John M. Rees, for respondent.

The probate of the will was not a bar. Testator could dispose of his property subject only to his debts. Mousseau v. Mousseau, 40 Minn. 236. The contracts are not void under the statute of frauds. The kind and character of the services rendered cannot be adequately paid for in money, nor was it ever intended that they should be so paid. Slingerland v. Slingerland, 39 Minn. 197; Brown v. Hoag, 35 Minn. 373. A contract to make a will is the subject of contract. Newton v. Newton, 46 Minn. 33; Pollock, Cont. 310. See Fry, Sp. Per. § 254; Maddox v. Rowe, 23 Ga. 431; Gill v. Newell, 13 Minn. 430 (462); Place v. Johnson, 20 Minn. 198 (219); Williams v. Stewart, 25 Minn. 516; Owens v. McNally, 113 Cal. 444; Townsend v. Vanderwerker, 160 U. S. 171; Patterson v. Patterson, 13 Johns. 379; Carmichael v. Carmichael, 72 Mich. 76; Linneman v. Morass, 98 Mich. 178; Kofka v. Rosicky, 41 Neb. 328; Nowack v. Berger, 133 Mo. 24; Wright v. Wright, 99 Mich. 170; Neal v. Gilmore, 79 Pa. St. 421; Frank's Appeal, 59 Pa. St. 190; Seddow v. Rosenbaum, 85 Va. 928; Swain v. Seamens, 9 Wall. 254; Walker v. Wilmington, 26 So. C. 80; McClure v. Otrich, 118 Ill. 320; Frame v. Frame, 32 W. Va. 463; Jaffee v. Jacobson, 1 C. C. A. 11, 21; Warren v. Warren, 105 Ill. 568.

BUCK, J.

Appeal by defendant from an order overruling a demurrer to plaintiff's complaint. The grounds of the demurrer are: First, that the court has not jurisdiction of the subject-matter of the causes of action therein stated; second, that the complaint does not state facts sufficient to constitute a cause of action.

The facts stated in the complaint and admitted by the demurrer are as follows: The plaintiff, whose maiden name was Caroline H. Hanson, when a year and a half old, with two sisters under six years of age, came, with their father, from Europe to America, to live with their uncle and aunt, James and Anna Mary Fosseen. James Fosseen died about December 3, 1894, and his wife died April 5, 1891. Plaintiff and her said sisters lived for several months with their said uncle and aunt after their arrival in this country, and thereafter they lived part of the time with the Fosseens, and part of the time with their father, until about January 23, 1876, when plaintiff's father died. At that time plaintiff was about eight years old, and her sisters were then of the respective ages of ten and thirteen years. Immediately after the death of their said father, the plaintiff and her said sisters, as aforesaid, and the said James and Anna Mary Fosseen, contracted orally by and between each other, in fact and in substance, as follows: That if the plaintiff and her said sisters would come to the house of the said James and Anna Mary Fosseen, as aforesaid, and live with them, and give them their services, as they should be directed, until they had grown up, in consideration thereof, at their death, said James Fosseen and his said wife would give and leave to the plaintiff and her said sisters, as aforesaid, all the property, both real and personal, which they then owned, and which they might own at the time of their death.

Relying upon said promises and agreements, and in pursuance of said contract, as aforesaid, the plaintiff lived at the house of said James Fosseen and his said wife, and gave them her services, as requested, daily and continuously, until she was 21 years of age, when she was married to Charles H. Svanburg, her present husband. The services so rendered by the plaintiff, as aforesaid, cannot be enumerated specifically, but they consisted of housework

of every kind and character, all work in and about the house, of every nature, required in housekeeping and in running and maintaining a home, of sewing, washing, ironing, of care and nursing for said James Fosseen and his said wife, and much other and different kind of work done and performed outside of the dwelling house, in many and different ways, as requested by the said James Fosseen and his said wife. During said time, as aforesaid, a strong affection existed between said James Fosseen and his wife and the plaintiff and her said sisters, aforesaid, and the labor and services, as aforesaid, and the relationship herein described, were daily and continuous until the plaintiff was married, as herein alleged. The plaintiff never received any compensation or wages whatever for her said work and services, nor for any part thereof.

These sisters inherited real estate of value of \$2,000; and about December 1, 1885, they made an additional contract with the said Fosseens, as follows: That if said plaintiff and her sisters would sell and convey their said real estate to one Swen Anderson, or to some other person whom said James and Anna Mary Fosseen would name, and give the money and proceeds thereof to said James Fosseen and his said wife, said James and Anna Mary Fosseen, and each of them, in consideration thereof, would, by deed or by will, convey or bequeath to said plaintiff and to her said sisters, as aforesaid, all the property which they then had or which they might thereafter acquire, both real and personal, in equal parts, such conveyance to take effect at the demise of the said James and Anna Mary Fosseen, and that said James and Anna Mary Fosseen, in consideration of the premises, would give and leave to the plaintiff and her said sisters, at their death, all the personal property which they should own at their demise. Said deed or will, as aforesaid, was to be left at the death of said James and Anna Mary Fosseen, or the title to all of said property, at their decease, was to be left in this plaintiff and her said sisters, as aforesaid.

Said plaintiff and her said sisters, relying upon said promises and agreements, as aforesaid, were thereby induced to, and did thereupon, sell, deed and convey their said real property, as aforesaid, to one Swen Anderson, at the request and solicitation of said James and Anna Mary Fosseen, at the price and for the sum of \$1,300.

Nearly all of said sum of \$1,300 was upon said December 1, 1885, or immediately thereafter, paid to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters. Thereafter the balance of said \$1,300 was paid to and turned over by said Swen Anderson to said James and Anna Mary Fosseen, by and with the consent of the plaintiff and her said sisters, and the whole of said \$1,300, as aforesaid, was, by and with the consent of the plaintiff and her said sisters, paid to said James Fosseen and Anna Mary Fosseen, and was by them used and appropriated to their own use. Neither of the Fosseens, by deed, conveyance, will or otherwise, in any manner, during their lifetime, made or executed any papers, nor did they, by gift or otherwise, give or leave the title to any of the property which they owned at the time the contract was made, or which they died seised of, as hereinafter alleged and set forth, to this plaintiff, or to her said sisters, or to either of them.

James Fosseen died seised of a large amount of real estate, a portion of which is specifically described in the complaint, situate within the jurisdiction of the court; and it is also alleged in the complaint that the defendant executor has disposed of a large portion of the estate, and now has the proceeds thereof in his hands. After the decease of James Fosseen, the defendant, Osman Fosseen, qualified as the executor of said will, and is engaged in settling the estate in accordance with the terms thereof, but has not distributed any portion thereof to the beneficiaries therein named. He gave a bond for only \$5,000, whereas the said estate is of the value of about \$25,000.

The relief asked in the complaint is that plaintiff be adjudged the owner of an undivided one-third of the real and personal property of which James Fosseen died seised; that said executor be enjoined from disposing of the same, as he is not financially responsible; that he be enjoined from paying to the beneficiaries in said will named any of said property, or conveying any thereof to said beneficiaries, but that one-third should be conveyed and turned over and paid to plaintiff. The demurrer was overruled, and defendant appeals.

It is proper to state that the other two nieces have each brought similar actions in equity in the district court, praying for the same relief, and a stipulation has been entered into between the parties whereby such actions shall abide the event of the decision in this case.

The two questions more distinctly brought before us for consideration are:

First. Are the contracts, or either of them, set forth in the complaint, within the statute of frauds?

Second. Was the probating of the will a final determination of all the interests of the plaintiff and her sisters in the property of the deceased?

The law is too well settled to need argument or citation of authorities that a person may make a valid obligation which is not within the statute of frauds, binding himself to make his will in a certain way, and thereby give certain property to a particular person or persons, and that such contract may be specifically enforced if such contract is not in itself unlawful. Under our statute of frauds (G. S. 1894, § 4215),

“Every contract for the leasing for a longer period than one year, or for the sale, of any lands or any interest in lands, shall be void unless the contract, or some note or memorandum thereof, expressing the consideration, is in writing, and subscribed by the party by whom the lease or sale is to be made, or by his lawful agent thereunto authorized, in writing.”

But by section 4216, same statute, it is provided that

“Nothing in this chapter contained shall be construed to abridge the power of courts of equity to compel the specific performance of agreements, in cases of part-performance of such agreements.”

The original statute of frauds was passed in the reign of Charles II.,¹ and a majority of the American states have enacted laws substantially, in legal effect, the same as the English statute. Section 4215 of our statute above quoted is an illustration.

“The controlling motive of the statute is one of expediency and convenience, and this motive has always been kept in view by the

¹ 20 Car. II. c. 3.

ablest courts in their work of interpretation. As its primary object is to prevent mistakes, frauds and perjuries, by substituting written for oral evidence in the most important classes of contracts, the courts of equity have established the principle, which they apply under various circumstances, that it shall not be used as an instrument for the accomplishment of fraudulent purposes; designed to prevent fraud, it shall not be permitted to work fraud. This principle lies at the basis of the doctrine concerning part performance, but is also enforced wherever it is necessary to secure equitable results." *Pomeroy, Cont. § 71.*

In the very nature of human legislative enactments, it is sometimes impossible to guard against every case of fraud, but equity, with its remedial powers, frequently steps in where law has failed or is powerless to accomplish the desired effect. And the legislature, recognizing the great wrongs that may sometimes be perpetrated in the name and under color of law, has enacted section 4216, above quoted, whereby equity may be invoked to stay the iniquities of those who rely upon the rigid rules of law; and it has thus made part performance a ground for the more perfect administration of justice. There are certain special features in the contract herein involved, appearing in the relation of the parties, in the terms of the subject-matter, and in the full performance on the part of the plaintiff, where damages would be inadequate if not impracticable. These special features and incidents of the contract and the relations of the parties are, in our opinion, sufficient to bring the case within the rules justifying an action for specific performance in behalf of plaintiff, whereby her interests can only be satisfied by an actual fulfilment of the stipulations which have been made for her benefit, and are justified by the authorities.

In the case of *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146, in an action to compel specific performance for conveyance of land, the plaintiff was never in the possession of the land, and never made any improvements thereon. The defendant was the father of the plaintiff, and owned a large farm; and the son had brought several different actions or proceedings against the father, each being practically a party in interest, and the father had one suit as plaintiff against the son, and all of them being on the court calendar for trial, the father proposed orally to the son that if he would dismiss

the action brought by him, and consent that the money involved in the other action should be paid to the father, and the proceedings discontinued, he (the father) would convey to the son a certain farm, and the personal property belonging to it, on the day when the son should be married to a young lady named. The son accepted the proposition, dismissed four actions, and the money involved in the other action was paid to the father, and the proceedings discontinued. The son married the young lady, but the father refused to make the conveyance agreed upon. An action by the son for specific performance was sustained, the court holding that the son could not be restored in respect to the action and proceedings to the position he was in at the time of making the oral agreement, nor could any action for damages he might bring put him in as good position, and that the agreement was not within the statute of frauds. In that case it was further stated that in case of payment in services, if their character be such that it is impossible to estimate their value by any such standard, the performance of them is a part performance; citing, among other authorities, *Rhodes v. Rhodes*, 3 Sandf. Ch. 305. In that case it was held:

"In general, the payment of the consideration is not such a part performance of a parol agreement for the purchase of lands, as will relieve it from the operation of the statute of frauds. But where the consideration consists of services to be rendered, which are of such a peculiar character that it is impossible to estimate their value to the vendor by a pecuniary standard, and the vendor did not intend to measure them by such a standard, the performance of the services will entitle the vendee to a specific performance, notwithstanding the contract was by parol. This was held of an agreement made between two brothers, who had always lived together and owned their property in common, by which the one having a family agreed to provide for and take care of the other, who had no family and who was subject to epileptic fits, during his life, in consideration that the former should have all the real and personal estate of the latter. Held, also, that the contract was so far certain and reasonable in its terms that it ought to be enforced in equity."

The doctrine of that case is cited with approval by Pomeroy in his work on Contracts (2d Ed.) page 161, where he says that the principle of this case is sound. He further says:

"But if the services are of such a peculiar character that it is im-

possible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages. Under these circumstances, the rendition of the services, or the procuring them to be rendered, is a part performance of the verbal agreement, and the case is quite analogous to those in which outlays are made for improvements by a vendee or lessee under a parol contract. This principle is, at bottom, the same as that upon which the courts have proceeded, especially in a series of recent English decisions, in specifically enforcing certain agreements for continuous acts of labor and services, and construction of works where the legal remedy of damages for their breach is impracticable. It has also been applied under analogous circumstances, where the plaintiff has not, indeed, made any payment, but has done other acts in pursuance of the verbal agreement, but not directly affecting its subject-matter, which would leave him without adequate remedy unless the contract is enforced. * * * Payment of the price, although not of itself sufficient to admit the equitable remedy, is always regarded as a strong circumstance in connection with other acts, such as possession or the making improvements."

In *Davison v. Davison*, 13 N. J. Eq. 246, the services of Olson were held to be a good part performance of his father's verbal agreement to leave him a farm after the father's death.

Vanduyne v. Vreeland, first reported in 11 N. J. Eq. 370, and on a second hearing in 12 N. J. Eq. 142, was a case in which

"The father of an infant child made an agreement with an uncle of the infant, at the uncle's request, to this effect: that the uncle should take the infant, and adopt him as his own child, and that he would treat him as his own son, and that the property he should have should be given to the child, so that it should belong to him at the death of the uncle and his wife. The uncle took the child, and had him baptized, and the child assumed his surname, and lived with him twenty-five years. *Held*, that the child might maintain his bill upon the agreement after such performance."

Wright v. Wright, 99 Mich. 170, 58 N. W. 54, was a case in which

Defendant, in his second year, was indentured to deceased until his majority. When he was eight, deceased and his wife, being childless, adopted him, under the law then in force, and his name was changed. He gave them his entire services, without pay, till

he was over twenty-two, when deceased died. The widow testified that they intended that he should be their heir; that her husband believed that this was effected by the adoption; that defendant thought he was their child till after her husband's death; and that they never talked about paying him for his services. The adoption law was held unconstitutional. *Held*, that defendant's performance entitled him to the inheritance, by way of specific performance of the oral contract.

In Missouri, in the case of *Sutton v. Hayden*, 62 Mo. 101, a case in which one

Mrs. Green made an agreement by which she took, in its infancy, the child of her brother, upon the understanding that at her death all the property owned by her should go to the child, the child was to come and live with her, be as a daughter to her, and take care of her for the remainder of her life. The child entered upon the performance of her part of the agreement, and throughout the course of Mrs. Green's life rendered the services, and, so far as lay in her power, performed her part of the agreement. Mrs. Green died without having in any way secured the property to the child.

The court, at page 114, said:

"There are things which money cannot buy,—a thousand nameless and delicate services and attentions, incapable of being the subject of explicit contract, which money, with all its peculiar potency, is powerless to purchase. The law furnishes no standard whereby the value of such services can be estimated, and equity can only make an approximation in that direction, by decreeing the specific execution of the contract."

See also *Sharkey v. McDermott*, 91 Mo. 655, 4 S. W. 107, 647, where it was held:

An agreement by a man and his wife to adopt a child, provide and care well for her, and leave her their property at their death, performed on the part of the child, is enforceable as to the property on their death.

In *Brinton v. Van Cott*, 8 Utah, 480, 33 Pac. 218, it was held as follows:

A verbal contract, whereby plaintiff agrees to live with and take care of an old woman until her death, in consideration of her promise to leave all her property to plaintiff, is taken out of the statute of frauds by the rendition of the services during the lifetime of the

woman; and, after her death, equity will specifically enforce the contract, on the theory of part performance, since the services rendered are of a peculiar character, not intended by the parties to be measured by a pecuniary standard. A contract by which an old woman, in apparent good health, and having the expectancy of many years of life, agrees to leave all her property, worth about \$5,000, to a 16 year old girl, in consideration of the latter's promise to live with and take care of her as long as she lives, is not void for want of mutuality and fairness; and after her death the contract will be specifically enforced in favor of the girl, who performed her part of the agreement, though the woman died within three or four months after the execution of the contract.

The court, at page 482, said:

"In this territory [Utah] the statute of frauds is in full force. 2 Comp. Laws, § 2831. It is therefore incumbent upon the appellant to show by her complaint that she has partly or wholly performed her contract, so as to take it out of the statute of frauds. 'When the consideration of the agreement consists in work, labor and services personally done and rendered by the plaintiff, if the value of the same can be ascertained with reasonable accuracy in an action at law, and adequately compensated by the recovery of damages, then neither the services themselves nor the payment for them will avail as a part performance of the verbal agreement. But if the services are of such a peculiar character that it is impossible to estimate their value by any pecuniary standard, and it is evident that the parties did not intend to measure them by any such standard, then the plaintiff, after the performance of these services, could not be restored to the situation in which he was before, or be compensated by any recovery of legal damages.' Under these circumstances, the rendition of the services is a part of the performance of a verbal agreement. The act of part performance of a verbal agreement for services must be such that it would be a fraud upon the party performing for the other party to refuse to perform his part as agreed between them. Pomeroy, Cont. 114."

See also *Korminsky v. Korminsky*, 2 Misc. 138, 21 N. Y. Supp. 611; *Godine v. Kidd*, 64 Hun, 585, 19 N. Y. Supp. 335; *Jaffee v. Jacobson*, 1 C. C. A. 11, 21, 48 Fed. 24, 4 U. S. App. 4; *McKinnon v. McKinnon*, 5 C. C. A. 530, 56 Fed. 409; *Haines v. Haines*, 6 Md. 435.

In the recent case of *Kofka v. Rosicky*, 41 Neb. 328, 59 N. W. 788, a girl about 17 months old was given by her parents to her uncle and aunt, under an agreement that they would adopt her, and rear, nurture and educate her, and that she was to be as their own child,

and at their death to receive all the property which they might own. She lived with them until they died, some 10 years, took their name, did not recognize or know her own father and mother in their true relation, but knew them as, and called them, uncle and aunt, and knew and recognized her uncle and aunt as father and mother. The uncle died intestate, possessed of real estate. It was held there was such a part performance of the contract by the parties thereto as entitled the child to a decree giving her the title to the property, by way of specific performance of the contract.

Now, the first contract brings this case within the doctrine above stated. The Fosseens were childless. They took these children as members of their own household. A strong affection grew up between the sisters and their foster parents. For many years they rendered faithful services to their uncle and aunt, doing household work of every kind, as well as outdoor work. They nursed and cared for these old people, and in no respect were they disobedient, negligent or unfaithful in their duties or attentions to their uncle and aunt. It is a fair inference that these childless old people regarded these nieces with a love and affection almost akin to that of parents for their own children, and, in return, the services and society of these children to them were of great benefit and pleasure. The value of such society and services to their uncle and aunt is incapable of measurement in money. *Emery v. Darling*, 50 Oh. St. 160-167, 33 N. E. 715; *Rhodes v. Rhodes*, 3 Sandf. Ch. 279.

The services were continuous for many years, until plaintiff was married, when she was 21 years old. The first contract would alone entitle the plaintiff to a specific performance. But the Fosseens encouraged and induced the plaintiff and her sisters to enter into the second contract, not that the Fosseens were, in substance, to do any more for the sisters than they had agreed to do under the first contract, but to procure from the sisters a further and valuable consideration to themselves. When their father died, in 1876, he left them real estate of the value of \$2,000, which the Fosseens induced them to sell; and, to please and satisfy these foster parents, they sold the real estate for \$1,300, or \$700 less than its actual value, and paid the consideration to the Fosseens, upon their fur-

ther promise to do just what they had, years before, previously promised to do,—leave their property at their death to the sisters; and this payment of such money was a strong circumstance, creating an additional equity for the enforcement of this action.

Now, courts of equity will not allow the statute of frauds to be used as an instrument of fraud. *Bork v. Martin*, 132 N. Y. 280, 30 N. E. 584. And, where a person tacitly encourages an act to be done, he cannot afterwards exercise his legal right in opposition to such consent, if his conduct or active encouragement induced the other party to change his position, so that he will be pecuniarily prejudiced by the assertion of such adverse claim. *Swain v. Seamens*, 9 Wall. 254. One of the underlying principles upon which an action for specific performance may be enforced is that the plaintiff cannot be restored to the situation in which he was before the contract was made, and cannot be compensated by the recovery of legal damages. *Slingerland v. Slingerland*, 39 Minn. 197, 39 N. W. 146; *Pomeroy*, Cont. 162. The land sold by the sisters at a loss of \$700 could not be restored to them, especially as the consideration received by them had passed into the hands of the Fosseens, and beyond the control of the sisters, and hence they could not be placed in statu quo.

While the complaint is not complete in its description of all the property of which James Fosseens died seised, nor of that sold, and the proceeds of which are held by the defendant as executor, nor of the amount and kind of personal property so held by the defendant, yet, as against the demurrer, there is enough real property the subject of the action, specifically described, to entitle the plaintiff to maintain this action. It is also to be noted that the contracts provided that the sisters should have the Fosseens' personal property on their decease; hence the contract was an entirety, and must be enforced as such. *Mann v. Higgins*, 83 Cal. 66, 23 Pac. 206.

Great stress is placed by the appellant upon the fact, as he alleges, that the plaintiff has had her day in court; that the will has been proven, and her claim has not been presented or allowed in the probate court; and that such court has fixed the status of the estate. It is a sufficient answer to this contention to say that this is not an action for the construction of a will, or for the distribution of any

property thereunder. The probate court has no jurisdiction over actions for the specific performance of parol contracts for the conveyance of real estate. G. S. 1894, c. 45a, tit. 10 (§§ 4623-4631), providing that the probate court may decree the conveyance of land, give that court jurisdiction only where the contract for conveyance is in writing; and it cannot decide controverted questions arising upon the merits even in such cases, but must leave the applicant or petitioner to his remedy by action. *Mousseau v. Mousseau*, 40 Minn. 236, 41 N. W. 977. Hence, if the probate court had no jurisdiction to hear this case, the plaintiff is not barred of her rights to enforce her contract in a court of general jurisdiction.

There is no merit in the contention of the defendant that the complaint does not show that the Fosseens had either jointly or separately any property whatever while they lived. Their promise was by the first contract to give and leave to plaintiff and her sisters all the property, both real and personal, which they owned and might own at the time of their death. Subsequently, by the terms of the second contract, said James Fosseen and Anna Mary Fosseen, and each of them, agreed to convey by deed, or bequeath, to said plaintiff and her sisters, said property, such conveyance to take effect upon their demise. This would include all the property which they owned jointly and separately.

The last point raised goes to the nonjoinder of parties plaintiff and defendant. But the demurrer is one as to want of jurisdiction, and insufficiency of facts stated to constitute a cause of action, and does not reach the objection that there is a defect of parties, either by nonjoinder or misjoinder.

Order affirmed.

START, C. J.

I concur in the result, and in all that is said in the opinion, except as to conveyance of plaintiff's real estate. I am inclined to the opinion that she could be compensated in damages for the real estate.

MITCHELL, J.

While in the main I concur in the foregoing opinion, I do not attach much, if any, importance to the fact that the plaintiff sold her own property for less than its value, and gave the proceeds to the

deceased. I think the case is taken out of the statute of frauds by the fact that the consideration which plaintiff has furnished consisted, not merely of services in the ordinary sense of the word, but also of the assumption of a peculiar personal and domestic relation to the deceased as a member of their family; and therefore the value of the consideration as a whole is incapable of being estimated by any mere pecuniary standard.

COLLINS, J.

I am of the opinion that plaintiff could be compensated in damages to the amount of her loss when selling her real estate, and, therefore, that the fact of such sale is of no consequence here.

CANTY, J.

I concur in a part of the result arrived at, but not in the foregoing opinion. I do not think that the statute of frauds should be brushed aside merely because the consideration for the land purchased on a verbal contract is personal services, whether it is difficult to estimate the value of such services or not. But I am of the opinion that the fact that the plaintiff was an infant, under the care and control of the vendor, and having no natural or legal guardian at the time, is a sufficient ground for taking the case out of the statute of frauds. Every one who assumes to act as guardian for, or manage the affairs of, an infant, is, at the election of the infant, estopped to deny that he has assumed the relation of guardian to the infant. 9 Am. & Eng. Enc. 121, and cases cited. Even where the adult has not the care or control of the infant, his dealings are scrutinized, and every presumption is against the adult, the same as if he bore to the infant the relation of guardian to ward. *Johnson v. N. W. Mut. L. Ins. Co.*, 56 Minn. 365, 57 N. W. 934, and 59 N. W. 934; *Alt v. Graff*, 65 Minn. 191, 68 N. W. 9. But, when the adult has the sole care and control of the infant, equity should hold that such a fiduciary relation exists between them as to take the case out of the statute of frauds as to the real estate, but not as to the personal property.

WILLIAM STRUCKMEYER v. W. L. LAMB.

January 25, 1909.

Nos. 11,421—(208).

Attorney as Witness—Privileged Communications—Offer of Evidence.

G. S. 1894, § 5662, subd. 2, provides that it is the policy of the law to encourage confidence and preserve it inviolate in matters between client and attorney, and to this end an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of his professional duty. And, under section 6180, it is the duty of the attorney to maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets, of his client. *Held*, that it was not error for the trial court to reject defendant's offer to prove by plaintiff's former attorney in the action certain confidential communications made by the plaintiff to such attorney relating to the merits of the case.

Verdict Sustained by Evidence.

Held, also, that the evidence justified the verdict of the jury.

Appeal by defendant from an order of the district court for Martin county, Quinn, J., denying a motion for a new trial. *Affirmed*.

C. D. & Thos. D. O'Brien and Voreis & Mathwig, for appellant.

H. H. Dunn, for respondent.

BUCK, J.

This case was before this court upon demurrer to the complaint, and reported in 64 Minn. 57, 65 N. W. 930. It has now been tried upon the merits, and a verdict rendered in favor of the plaintiff for the sum of \$225. The defendant moved for a new trial, and, this being denied by the court, he brings this appeal, alleging errors of law occurring at the trial and that the verdict is not sustained by the evidence. Upon the last ground there appears to have been a sharp conflict in the evidence, and the weight thereof was clearly for the jury. We see no reason for disturbing the verdict, as it is sustained by the evidence.

The defendant's attorney, however, insists that errors of law occurred on the trial which entitle him to a new trial, two of which he seemed to urge more strenuously than the others, viz.:

1. The attempt to prove by the plaintiff, Struckmeyer, on his cross-examination, that he had a certain conversation with his attorney, a Mr. Fisk, at the time he commenced this action, in regard to what plaintiff would testify to as to buying the notes and mortgages in controversy, which evidence, being objected to by the plaintiff upon the ground that such conversation and communication by the client to his attorney was privileged, was excluded by the court. The defendant's counsel, in support of this contention, does not cite a single authority. However, it is not necessary for us to pass upon this question, as the defendant took no exception to the ruling of the court.

2. Defendant's counsel also attempted to prove, by the same attorney for plaintiff, certain communications between the plaintiff and the attorney (Fisk), and thereby show that plaintiff had stated to his attorney what he would testify to as to the notes in controversy. Upon objection being made by plaintiff, the court rejected the evidence upon the ground that the communication was privileged. The defendant excepted. Mr. Fisk was not acting as plaintiff's attorney in the trial of this action, but had prepared the pleadings, and was plaintiff's attorney upon the former appeal in this court. The communication offered to be proven related to matters which took place while the relation of client and attorney existed between them. Fisk was called as a witness by the defendant, who thereby sought to impeach the evidence of the plaintiff as given upon this trial.

It is the policy of the law to encourage confidence and preserve it inviolate in matters between client and attorney, and to this end an attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of his professional duty. G. S. 1894, § 5662, subd. 2. It is also the sworn duty of the attorney to maintain inviolate the confidence, and, at every peril to himself, to preserve the secrets, of his clients. Section 6180, subd. 5. This rule follows the attorney after the relation of client and attorney ceases, as he has no right voluntarily, nor by compulsion, to disclose confidential communications previously made to him by his client. Such, also, was the doctrine of the common law. The origin of the rule grew

out of the fact that, in the ordinary transactions of the world, people must resort for legal advice to legal advisers, by reason of the great multiplicity of suits and their complex nature, as each litigant found it difficult, if not impossible, to act as his own attorney,—a habit which existed in ancient times. In order, therefore, to protect the interests of the client and encourage the employment of attorneys, this immunity from having the facts, known only to the client, divulged, became an absolute necessity, and so well settled is this doctrine that no further discussion of the question is needed. The evidence thus offered was properly excluded. In justice to Mr. Fisk, the attorney, it should be stated that it does not appear that he in any manner sought or offered to divulge the confidential communication made to him by his client.

There were some requests which the defendant asked the court to give the jury which, standing alone, should have been given; but they were all covered by the general charge, hence we do not consider the refusal to give them as error.

No reversible errors appearing in the record, the order denying defendant's motion for a new trial is affirmed.

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88	418

SAMUEL D. PETERSON v. WESTERN UNION TELEGRAPH COMPANY.

January 25, 1890.

Nos. 11,466—(225).

Libelous Telegram—Liability of Company—Punitive Damages.

Where the station agent of a telegraph company, acting within the scope of his employment, maliciously transmits a libelous message over the wires of said company to another of its station agents, addressed for delivery to a third person, which is done accordingly, the company is liable in punitive damages.

Verdict Excessive.

The verdict of the jury on behalf of plaintiff for the sum of \$2,000 held excessive, and that a new trial should be granted, unless the plaintiff consent to remit all of the same in excess of \$1,000.

Action for libel in the district court for Brown county. The case-

was tried before Webber, J., and a jury, which rendered a verdict in favor of plaintiff for \$2,000. From an order denying a motion for a new trial, defendant appealed. Affirmed on conditions.

Ferguson & Kneeland, for appellant.

The submission of the question of punitive damages was error. The infliction of such damages in this jurisdiction rests on the theory that they are for punishment and example. *Hoffman v. Northern Pac. R. Co.*, 45 Minn. 53; *North v. Johnson*, 58 Minn. 242. A corporation is not liable in punitive damages for wantonness or oppression on the part of its servant, not actually participated in by it. *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101; *Staples v. Schmid*, 18 R. I. 224. See also *Ricketts v. Chesapeake*, 33 W. Va. 433; *Downey v. Chesapeake*, 28 W. Va. 732; *Talbott v. West Virginia*, 42 W. Va. 560; *Robinson v. Superior*, 94 Wis. 345; *Hagan v. Providence*, 3 R. I. 88; *Claghorn v. New York*, 56 N. Y. 44; *Murphy v. Central*, 48 N. Y. Super. Ct. 96; *Eviston v. Cramer*, 57 Wis. 570; *International v. Garcia*, 70 Tex. 207; *Dillingham v. Russell*, 73 Tex. 47; *Gulf v. Holzheuser* (Tex. Civ. App.) 45 S. W. 188; *Kiel v. Charters*, 131 Pa. St. 466; *Sullivan v. Oregon*, 12 Ore. 392; *Ackerson v. Erie*, 32 N. J. L. 254; *Haines v. Schultz*, 50 N. J. L. 481; *Great Western v. Miller*, 19 Mich. 305; *McCoy v. Philadelphia*, 5 Houst. 599; *Mendelsohn v. Anaheim*, 40 Cal. 657; *City v. Jeffries*, 73 Ala. 183; *Foster v. Pitts*, 63 Ark. 387; *Kutner v. Fargo*, 20 Misc. 207; *Warner v. Southern*, 113 Cal. 105. The act of sending the message was not subject to adoption or repudiation by defendant, so as to affect its responsibility for an actual injury caused by it, if wrongful. There can be no ratification without both knowledge of the fact to be ratified and intention to ratify it. *Edwards v. London*, L. R. 5 C. P. 445, 447. Mere retention of a servant is not evidence of ratification. *Dillingham v. Russell*, *supra*; *Gulf v. Holzheuser*, *supra*; *Williams v. Pullman*, 40 La. An. 87. For those aggravations which may arise out of the servant's wantonness and malice, the employer is not on the same footing as the agent. *Great Western v. Miller*, *supra*; *Hagan v. Providence*, *supra*.

Even including punitive damages, the verdict is excessive. It is the duty of the court to set aside an excessive verdict, no matter

how many verdicts have been returned. *Peterson v. W. U. Tel. Co.*, 65 Minn. 18. See *Woodward v. Glidden*, 33 Minn. 108; *Dillon, L. & J. Eng. & Am.* 130; 1 *Sedgwick, Dam.* §§ 358-368; *Pratt v. Pioneer Press Co.*, 32 Minn. 217, 35 Minn. 251; *Bridge v. City*, 71 Wis. 363; *McCarthy v. Niskern*, 22 Minn. 90; *Dennis v. Johnson*, 42 Minn. 301.

S. L. Pierce, for respondent.

By weight of authority and on principle, when the act of the agent is malicious or grossly negligent, the principal may, in the discretion of the jury, be punished, though the act may not have been authorized or directed by the principal, provided it was done in the authorized employment of the agent. Everywhere it is conceded that, when the function of the agent is that of superintendent, the principal may be held liable in punitive damages, if the agent could have been held had he been acting in his own business. 2 *Shearman & R. Neg.* § 749; *Baltimore & O. R. Co. v. Baugh*, 149 U. S. 368, 381. *McHale* was such a servant as is included in the term superintendent. See *Goddard v. Grand Trunk*, 57 Me. 202; *Wood, Mast. & S.* § 323, and cases cited; 2 *Shearman & R. Neg.* § 479, and cases cited; *Francis v. W. U. Tel. Co.*, 58 Minn. 252, 262. The verdict was not excessive. *Pratt v. Pioneer Press Co.*, 32 Minn. 217, 221. After two successive verdicts have been set aside as excessive, the court will hesitate to set aside a third on that ground. *Clerk v. Udall*, 2 Salk. 649; *Chambers v. Robinson*, 2 Strange, 691; *Shaw v. Boston*, 8 Gray, 45; *Wilcox v. Landberg*, 30 Minn. 93; *Harrigan v. Savannah*, 84 Ga. 793; *McDonald v. Woodruff*, 2 Dill. 244, note; *Gulf, C. & S. F. Ry. Co. v. Ellis*, 10 U. S. App. 640, 645. The damages were not unreasonable. In libel, the better the reputation, the heavier should be the damages. See *Malloy v. Bennett*, 15 Fed. 371; *Ferguson v. Evening Chronicle*, 72 Mo. App. 462; *Alabama v. Sellers*, 93 Ala. 9; *Marble v. Chapin*, 132 Mass. 225; *Williamson v. Frere*, 43 L. J. C. P. 161; *Young v. Fox*, 49 N. Y. Supp. 634.

BUCK, J.

Action for libel. Verdict for plaintiff for \$2,000 damages, motion for new trial on part of defendant, which was denied, and it appeals. The plaintiff was a state senator, whose home was at New Ulm, but,

the senate being in session, and while the plaintiff was attending the same at St. Paul, the defendant, through its station agent P. R. McHale, at New Ulm, sent to the plaintiff the following telegraphic message:

"S. D. Peterson, care Windsor:

Slippery Sam: Your name is pants.

Many Republicans."

This case has been before us on two former occasions. 65 Minn. 18, 67 N. W. 646, and 72 Minn. 41, 74 N. W. 1022. Upon the first appeal this court construed the message as susceptible of a libelous meaning on its face, but held that the verdict of \$5,000 damages against the defendant was so excessive as to justify the conclusion that it was the result of passion and prejudice. Upon the second appeal the order of the trial court denying a new trial was reversed for errors of law occurring at the trial. The case has been tried four times, the verdicts each time varying in amount.

The more distinct and important errors assigned by the appellant are: First, that the plaintiff is not in any event entitled to recover, under the evidence in this case, anything more than actual damages, and not entitled to punitive damages or smart money; second, that the court erred in charging the jury that McHale, the agent of the defendant in receiving and transmitting the message in question, represented and stood in the place of the telegraph company, and that the defendant is liable and responsible for his acts and conduct in receiving and transmitting the message to the same extent that McHale would have been personally responsible had he been the owner and operator of the telegraph line; third, that the damages awarded by the jury are excessive, and appear to have been given under the influence of passion and prejudice.

Upon the first proposition we do not agree with the contention of counsel, unless his second proposition is sound as to the acts of the agent and as to the want of liability of the company for his acts. The trial court charged the jury that, if they found from the evidence that the defendant or its agent maliciously published the libel as charged, it was their duty to return a verdict in favor of the plaintiff for such damages as he had sustained to his reputation by

reason of the publication, and also gave as part of his charge the language used in the second assignment of error. This, of course, involves the question of the liability of the defendant for the act of the agent if he was actuated by malice or bad faith, and upon this question the jury found in favor of the plaintiff; that is, under this instruction the jury returned a verdict against the defendant for \$2,000. Of course, if the action had been against McHale personally for his malicious publication of the libel, and the jury had found him guilty, they could have awarded punitive, vindictive or exemplary damages. It is clearly competent for a jury to find vindictive damages in an action for libel, where the publication was done maliciously. *Newell, Defam., Sland. & L. 842; Bergmann v. Jones, 94 N. Y. 51.* In the last case cited it is said that, when the falseness of the libel is proven, as a general rule it is sufficient to warrant the jury in giving exemplary damages.

But the important question in the case at bar is this, is the company itself liable for exemplary damages by reason of the act of the agent McHale, although it did not know, direct or authorize it? The answer to this is reached by considering and determining the powers and duties of the agent, and whether he was acting within the scope of his employment.

The defendant maintained a general telegraph office at New Ulm, and there McHale had the entire management of the business. Under this power and duty his business required him, as such agent, to examine writings, messages and communications, and transmit them to persons to whom they were addressed. From the very nature of the business, his position required him to do this. The company cannot well act in the numerous telegraph stations throughout the country except through agents. While these branch offices in general are under the management and control of a superintendent, manager or the corporation itself, yet this agent is almost universally recognized, as he must necessarily be, as the representative of the corporation itself. In the absence of the master the agent is the vice principal, superintending and controlling the business there transacted, and of course stands in the place of the master for the time being. It is right, therefore, that the responsibility and obligation of the master should flow with the duty conferred

and imposed, where the representative is acting within the scope of his employment. That is the case at bar.

McHale had control of the business at the New Ulm telegraph station. He alone saw the libelous message, and sending it was a matter incident to his business, and pertaining to the particular duty of his employment. He was acting in the capacity for which he was employed, and, having this power, he was acting within the scope of his authority. He did not perform the act for his own purpose, but for that of the master who employed him, and for the master's benefit. That he abused the authority is no defense in such case. The master had the choice of his agent, and for the abuse of that agent the master should answer to the citizen who became the victim of that abuse without his fault. One who employs another to do an act for his benefit, and who has the choice of the agent, ought to take the risk of injury to third persons by the manner in which he does the business. A telegraph corporation derives its legitimate corporate powers from the law, and that law should not be violated without a corresponding liability for torts committed under it. Station agents may be irresponsible pecuniarily, and if, for their malicious acts done in the scope of their employment, the corporation is not liable, the public would be at the mercy of an unscrupulous telegraph operator; and hence the public are greatly interested in such a question, and the liability for such wrongs should rest upon that body which by its acts creates the power and the opportunity for committing them. It would be a lamentable condition of the rights of the citizen if, under the guise of exercising lawful corporate powers, the corporation could permit the citizen to be defamed by the false and malicious publication of its agent while acting as its duly-appointed representative. In *Scott & Jarnagin's Law of Telegraphs* (section 138) it is said that

"The company can only perform the duty of sending and receiving a message through the intervention of an agent; and if he may wilfully and corruptly interfere with commercial transactions, or malignantly expose family affairs, and not involve the company, such a ruling would stimulate the wicked; whilst at the same time, good men would be convinced that their chances for indemnity rested alone upon the solvency of treacherous agents. We have seen no instance in the litigated cases where telegraph companies have

claimed such immunity. * * * However, the authorities are numerous and highly respectable, and conclusive except where controlled by binding local decisions, which hold the former liable for the wilful acts of the latter, when done in the performance of duties assigned."

In the same work it is said (section 138a):

"Aside from the statutory and common-law duty of good faith in the transmission of messages for the public, there is another sense in which telegraph companies may become responsible for mala fides and malicious use of its franchises. A libel is any false, malicious and personal imputation, effected by any writings, pictures or signs, tending to alter the party's situation in society or business for the worse, and a corporation may become responsible for its publication, even in punitive damages."

Mr. Wood in his work on the Law of Master and Servant (section 323) says that:

"It may be regarded as settled by the better class of cases, that whenever exemplary damages would be recoverable, if the act had been done by the master himself, they are equally recoverable when the act was done by his servant."

And he cites the well-considered case of *Goddard v. Grand Trunk*, 57 Me. 202, where numerous authorities are collected supporting his view: It is true that this doctrine thus enunciated was applied in an action against a railroad corporation, but we perceive no distinction between it and a telegraph corporation.

For "a telegraph company is liable ex delicto for an injury done by its agents or servants to third persons, for misfeasance as well as nonfeasance." *Scott & J. Tel.* § 69.

In *Shearman & R. Neg.* (5th Ed.) pt. 2, c. 9, this question is thoroughly discussed, and it is there said:

"Where the relation of master and servant exists, the master is responsible to third persons for the damage caused by the wrongful acts or omissions of his servants, in the course of their employment as such. * * * The principle which lies at the foundation of this rule has been differently stated in several judicial opinions; and the abstract justice of the rule itself has been occasionally questioned. But the soundness of the principle and the necessity of the rule, which we have inherited from the Roman law, have received

new and convincing illustrations in the immense development of modern corporations. If the rule of respondeat superior were now to be abrogated, it would be almost impossible to carry on the present complex business of society. Every person having any pecuniary responsibility would shelter himself behind the forms of a corporation, which would, in such case, be free from all responsibility for the negligence and violence of its agents, without direct evidence of authority for their acts, while such evidence could be, in almost every instance, suppressed."

This rule may frequently work a hardship, but when the master substitutes an agent or servant in his own place, and clothes him with power to act for the master's benefit in serving the public, he is not permitted to shelter himself behind the plea of nonliability for the act of the agent, and the rule of respondeat superior should not be relaxed, whether the master is a corporation or an individual.

Upon the proposition that the verdict of the jury awarding the plaintiff \$2,000 is excessive, the court is in accord with the contention of the defendant.

"The sole publication of the libel in this case by the defendant was in making it known to its own agent at St. Paul, and the damages of the plaintiff were limited to such as he sustained by reason of the publication to such agent. In view of the fact that such agent could not disclose the contents of the libel without becoming a criminal, and exposing himself to serious punishment, and that there is no evidence to justify the inference that the contents of the message ever reached the public except through the plaintiff, a verdict assessing his damages at \$5,200 is simply farcical. It can only be accounted for on the ground that it was the result of passion or prejudice."

This is the language used by this court in disposing of this case on the first appeal. 65 Minn. 18, 24, 67 N. W. 646. The same facts as ground for damages appear on this appeal, but the verdict is very much less.

The criminal liability for divulging the contents of any telegraph message or dispatch intrusted to him for transmission or delivery is found in G. S. 1894, § 6782, and is there made a misdemeanor, and punishable as such. This law also applies to all employees. If McHale had merely received the message, without any further act, neither he nor the company would have been liable, although he

well knew its contents. The publicity consisted in sending it to another agent or employee. If it could possibly be presumed that other employees might have heard its contents in its transmission, the same presumption exists of silence and secrecy on their part, because of their liability to punishment under the criminal law if they should divulge its contents. But it is not proven, nor can it be legally inferred, that others knew of its contents. The only person to whom its contents were divulged was the agent at St. Paul then under a penal obligation not to divulge the dispatch except to deliver it to the plaintiff.

The transmission of the dispatch, its receipt by the St. Paul agent, and the mental distress of the plaintiff constituted the basis of his right to damages. Of course, plaintiff himself making the message public would not be ground for damages, even if so made in order to maintain his right to prosecute this action. Considering all these facts, we are of the opinion that the damages awarded are excessive; that the jury must have been actuated by passion, prejudice, partiality, or swayed by some improper influence. In such case the amount should be reduced or a new trial granted. See *Fredrickson v. Johnson*, 60 Minn. 337, 62 N. W. 388.

The order of the district court denying the defendant's motion for a new trial must be reversed, and a new trial granted, unless the respondent file in the office of the clerk of the district court where the trial was had a remittitur of the sum of \$1,000 within 30 days after the mandate of this court shall be filed in said district court. In case such remittitur is so filed, the plaintiff may recover judgment upon said verdict in his behalf in the sum of \$1,000, and the order of the lower court stand affirmed for that amount.

JENNIE E. REILLY v. CHICAGO GUARANTY FUND LIFE SOCIETY.

January 25, 1899.

Nos. 11,467—(254).

Life Insurance—Reinstatement of Insured—Construction of Health Certificate.

In 1885 an applicant for an insurance policy made a verified statement concerning his health, which was accepted by the company, and a policy duly issued, upon which the insured paid the assessments for a period of 10 years, when he defaulted in one payment on June 17, 1895. The by-laws of the company provided for reinstatement of the insured within one year after default, upon receipt of satisfactory evidence of good health and the payment by the member of all sums for which he might then be delinquent. The insured signed a health certificate, prepared and furnished by the company, dated July 25, 1895, which contained this clause: "I hereby certify that I am on this 25th day of July, 1895, and have continuously been, of temperate habits, in good health, and free from all diseases and infirmities." *Held*, that this certified clause included only the time during the delinquency, viz., from June 17, 1895, to July 25, 1895.

Action in the district court for Ramsey county to recover \$5,000 upon an insurance policy. The court, Bunn, J., directed a verdict in favor of defendant, and from an order denying a motion for a new trial plaintiff appealed. Reversed.

Palmer & Beek, for appellant.

Hew & Butler, for respondent.

BUCK, J.

In December, 1885, Philip Reilly, then aged 42 years, applied to the Northwestern Guaranty Life Insurance Company of St. Paul for a life insurance policy of \$5,000 on his life, which was issued and delivered to him in January, 1886, and which was to run until his death. The application contained numerous answers to printed questions submitted by the company concerning the health of Reilly, which were satisfactory to the company. On November 10, 1891, an agreement was entered into between said company and respondent for the reissuance of the policy by the latter to Reilly, to which he consented, and received in lieu thereof said reissued

policy, dated December 17, 1891, payable to his estate at his death; and he paid the required assessments and premiums on this last policy until June 17, 1895, when he neglected to pay the assessment or premium then due. The by-laws of respondent (article 5, § 5) provide as follows:

"Sec. 5. The board of directors or executive committee may reinstate a delinquent member at any time within one year upon receipt of satisfactory evidence of good health and the payment by the member of all sums for which he may then be delinquent."

And among the conditions and provisions printed on the back of the policy is this one:

"If this policy lapse or becomes forfeited through failure to make the stipulated deposits, it may be reinstated, upon approval of the executive committee of the society, by payment of all arrearages and the submission of satisfactory evidence of good health; but such reinstatement shall be optional on the part of the society, and the acceptance of overdue deposits or instalments shall not be held to establish a precedent for the receipt of deposits or instalments at dates other than those written in the indorsement hereon."

July 25, 1895 (38 days after the date of the default), the insured paid to the respondent all arrearages, and applied for a reinstatement of his policy. The application was made upon a printed form, prepared and furnished him by respondent; the blanks for date of application and number of policy being filled by the insured. The substance of the application is as follows:

"I hereby certify that I am on this 25th day of July, 1895, and have continuously been, of temperate habits, in good health, and free from all diseases and infirmities; and I hereby repeat all statements and warranties contained in my application for membership, and warrant the same and the statements therein, and each of them, to be full, complete and true. My certificate or policy No. 14,620, issued by the Chicago Guaranty Fund Life Society, having become forfeited by reason of my failure to make the payments as stipulated in said policy, I desire to be reinstated, and for this purpose tender herewith the amount of my delinquency, and agree that the acceptance of same shall be valid only on condition that said statements and warranties, in said application and herein, are full, complete and true; and, if the same or any of them are untrue, said certificate or policy shall be and is void. The receipt of said payment shall not change the time, nor be considered, or held to be, or consti-

tute a precedent for the payment of future mortuary calls, dues, guaranty fund instalments, annual deposits, or instalments thereof, as the case may be, under said certificate or policy."

On receipt of the money in payment of arrearages, with this application, the policy was reinstated.

June 16, 1896, upon application of the insured to have the beneficiary changed, and his wife, Jennie E. Reilly, designated as such, respondent took up and cancelled its policy originally issued December 17, 1891, and issued in its place the policy in suit. This policy has the same number, bears the same date and is identically the same in form and substance, as the original policy, except in the name of the beneficiary, and except as to the clause in the original policy reciting that it was issued in lieu of the policy of the Northwestern Guaranty Life Insurance Company, and that the application for that policy and the statements and representations made in such application applied to and became a part of respondent's policy.

The insured continued to pay the premiums or assessments on said policy until his death, which occurred June 10, 1897, and was caused by a gunshot wound in the head. Prior to October 1, 1897, appellant duly notified respondent of the death of the insured, and furnished to it due and satisfactory proofs thereof, as required by the terms of the policy, and the same were received, accepted, retained and acted upon by respondent without objection.

This action was commenced January 20, 1898. It appeared from the testimony that during the last months of the year 1892 the insured had suffered from la grippe, and during portions of the years 1893 and 1894 from asthma; but for many months before June 17, 1895, and from that time to July 26, 1895, and for a long time after that time, he was and continued to be in good health, and free from disease or infirmity. At the close of the evidence, counsel for defendant requested the court to direct a verdict for the defendant. This the court did, solely upon the ground that the application for reinstatement, as the court construed it, contained the representation and warranty—the truth of which was expressly made a condition to the validity of the reinstatement and policy—that the

insured was then, and had continually been, not only from the date the policy lapsed, June 17, 1895, but from December 23, 1885, the date of the application for insurance in the Northwestern Guaranty Life Insurance Company, or from December 17, 1891, the date of the issuance of respondent's first policy, in good health and free from all diseases and infirmities, and that, by reason of the sickness above referred to, the representations were false, and the reinstatement and policy thereby avoided.

The only question which we need determine arises upon the construction to be placed upon Reilly's health certificate, as follows, viz.: "I hereby certify that I am on this 25th day of July, 1895, and have continuously been, of temperate habits, in good health, and free from all diseases and infirmities,"—read, of course, in the light of the prior proceedings. The company contends that the words "have continuously been of temperate habits, in good health, and free from all diseases and infirmities," relate to the period between the date of the original application, viz. December 23, 1885, and July 25, 1895, the date of the application for reinstatement, and that this statement was untrue and vitiated the policy. We do not so construe the language used.

If Reilly had died at any time after the insurance, and before the default, no serious question could have been made but that the insurance could have been collected by the proper party, even if Reilly had been in poor health up to the time of such death. It seems to be a conceded fact that Reilly had suffered from asthma and la grippe, and received medical treatment therefor, during portions of the years 1892, 1893 and 1894. But at the time of the default in payment of the premium or assessment, and for some time prior thereto, and on July 25, 1895, he had been continuously in good health, and free from all diseases and infirmities; hence all risks had been paid for up to the time of such default. No matter if he had been taken sick on the day the insurance policy was issued, and had remained in poor health up to the day preceding such default, the policy would have been in force. It was not his poor health that caused the default, but nonpayment of the assessment. The policy had run nearly 10 years when the default occurred, and no complaint is made that he was not previously prompt in paying his

assessments. That he had been in poor health during two or three years in the interim does not affect the question.

The statements made by Reilly in the original application were true, and not challenged. His subsequent sickness was no fault of his own, and did not exonerate the company from liability. Its own by-laws expressly provided for reinstatement of a delinquent member at any time within one year, upon receipt of satisfactory evidence of good health, and the payment by the member of all sums for which he may have been delinquent; but, by the same by-law, this reinstatement was optional with the company. It exercised this option voluntarily, prepared its own form of certificate of health, made no inquiries as to the condition of his health prior to the date of his delinquency, and had no medical examination as to the condition of his health prior to the time of his default. It is a notorious fact that there are thousands of cases of life insurance, and in many instances the insured are in poor health for longer or shorter periods during the life of the policy, but this in no wise lessens the liability of the insurers. Risks from poor health and resulting deaths are some of the elements which constitute the ground of insurance business, and the obligation of the insurer to pay continues until death or default in payment of the assessment. The risk of poor health after issuance of the policy up to the time of default was in this case already paid for; and the consideration for reinstatement was the good health of the insured at the time of his application for the same, his certificate that he had continuously been of temperate habits, in good health, and free from all diseases and infirmities during the time of such default, and the payment by him of the delinquent assessment or premium. This language referred to must therefore be construed as relating to the period for which the delinquent premium was paid, viz., from June 17, 1895, to July 25, 1895, and not to a prior period, for which there was no default. In other words, the time of the delinquency, the payment of the premium for that time, and the continuous temperate habits and good health of Reilly, were co-extensive.

Further on in the certificate, Reilly repeats that his statements and warranties in his application for membership were full, complete and true, and says that, his policy having been forfeited by

reason of his failure to make payments as stipulated in said policy, he desires to be reinstated, and for this purpose tenders therewith the amount of his delinquency, and agrees that

"The acceptance of same shall be valid only on condition that said statements and warranties in said application and herein are full, complete and true; and, if the same or any of them are untrue, said certificate or policy shall be and is void."

The contents of the original application for membership related only to prior or then-existing obligations. The conditions existing during the delinquency, and until reinstatement, were apparently the same as existed at the date of the original application, except as to the age of the insured. Hence only two things were to be done, viz., payment by the insured of the delinquent assessment, and his reinstatement by the insurer. This was done, and everything seemed to be in statu quo until the death of the insured, June 10, 1897. If there is any ambiguity in the language used, it was the fault of the company. The view that it is doubtful and ambiguous is the only one favorable for the insurer, and, where such doubts and ambiguities exist, they must be resolved in favor of the insured or his beneficiaries. *Geare v. U. S. Life Ins. Co.*, 66 Minn. 91, 68 N. W. 731; *Mareck v. Mutual R. F. Life Assn.*, 62 Minn. 39, 64 N. W. 68; *Loy v. Home Ins. Co.*, 24 Minn. 315.

If the language prepared and used by the company in the health certificate was therein inserted for the purpose of giving it the effect contended for by the respondent, then it would operate as a snare against the insured, and impose upon his estate or beneficiary a fatal loss, which he never contemplated, for he well knew that, as construed by the company, he was certifying to a falsehood, viz., that he had been continuously in good health from the time of the original application to the time of making the health certificate. If there is any uncertainty in the language used, the company is responsible for it, whether its insertion was the result of its own negligence, fraud or mistake.

Order reversed, and new trial granted.

C. J. McCONVILLE v. CITY OF ST. PAUL.

January 27, 1899.

Nos. 11,446—(229).

75	383
79	10
479	11
79	12
478	13
479	33
179	34

Municipal Corporation—Grading of Street—Abandonment of Improvement—Recovery of Assessment.

75	383
86	100

In 1891 the city of St. Paul instituted proceedings for opening, widening and extending East Third street therein, and made assessments on abutting property for such purpose. The improvement was partly made, and plaintiff, who owned several abutting lots, was assessed thereon, and by judicial proceedings compelled to pay \$1,294.43 to said city. His lots were not benefited by said grading, and the contemplated work and improvement of said street were abandoned by the city in June, 1893. This action was commenced in January, 1898. *Held*, that the finding of the trial court that the work on said street, and the projected improvement thereon, were never completed, and were wholly abandoned by the city, was justified by the evidence, and that plaintiff is entitled to recover from said city the amount so paid by him, as upon a failure of consideration.

Action in the district court for Ramsey county to recover the amount of an assessment paid by plaintiff. The court, O. B. Lewis, J., found in favor of plaintiff; and from an order denying a motion for a new trial, defendant appealed. Affirmed.

James E. Markham and Carl Taylor, for appellant.

The evidence does not show that the improvement of East Third street was abandoned, so as to bring the case within *Valentine v. City of St. Paul*, 34 Minn. 446. The finding that the improvement was abandoned is not sustained, either by the rescission or abandonment of the contract, or by the resolution of the common council, or by the lapse of time. Plaintiff's remedy is by mandamus to compel the board of public works to proceed with the improvement. The measure of damages should have been plaintiff's proportion of the cost of completing the work.

Ambrose Tighe and John W. Lane, for respondent.

BUCK, J.

In January, 1891, the defendant instituted proceedings for opening, widening and extending East Third street, in the city of St. Paul, from White Bear avenue to the eastern boundary line of said city, a distance of one mile, across section 35, township 29, range 22, in Ramsey county, in this state. This property was then owned by one David J. Hennessy, who opposed such proceedings. The board of public works of said city confirmed the proceedings, and Hennessy appealed to the district court. On June 16, 1891, the common council of the defendant duly established the grade of said East Third street from Earl street to White Bear avenue, a distance of one mile and a half, and on September 22, 1891, established the grade of said East Third street from White Bear avenue to the east city limits. This last-described grade of one mile so ordered was on the land of Hennessy; the city having given a bond of indemnity to him, in order that it might proceed with the condemnation of said land, and grade the same. Prior to the spring of 1891 East Third street had been graded as far east as Earl street. In March, 1892, the contract for the improvement was let at the price of \$47,000, and an assessment levied to cover it and the attendant expenses. About \$21,000 of this assessment was levied on the Hennessy farm, and \$28,000 was divided among the lots fronting on the other mile and a half of street to be graded.

The plaintiff owned 14 lots. One of the lots was assessed \$201; 12, \$80.50 each; and one, \$76.50. On August 24, 1892, the plaintiff paid \$1,294.43 into the city treasury, and the city ever since has had, and still has, his money. The work, as a consideration for which it was paid, was begun and continued at intervals until June, 1893. In 1893 the defendant city council passed the following resolution:

"Resolved, that all proceedings heretofore had for the opening, widening and extension of East Third street from White Bear avenue to the east city limits be, and the same are hereby, in all things annulled, and that all proceedings had for the condemnation of an easement for slopes along the line of East Third street from White Bear avenue to the east city limits be, and the same are, in all things annulled. Resolved, further, that the corporation attorney be, and he is hereby, authorized to stipulate for judgment in the action pending in the United States circuit court, wherein David

J. Hennessy is the complainant and the city of St. Paul and Thomas Keough and Daniel Donnelly are defendants, that judgment be entered that the condemnation proceedings heretofore had for the opening of East Third street across section 35, town 29 north, range 23 west, be declared null and void, and the condemnation proceedings had for the acquiring of an easement for slopes across said section on the property abutting on the line of East Third street be also declared null and void, and that the assessment made against said section for the grading of East Third street be set aside and declared null and void, and that the defendants in said suit have no right to enter or do any work upon said section under the contract heretofore entered into between the city of St. Paul and Thomas Keough and Daniel Donnelly; and the corporation attorney is also authorized to stipulate for proper judgment in the appeal cases of David J. Hennessy against the city of St. Paul from the confirmation of the assessments for the opening of East Third street, and also from the confirmation of the assessment for the acquiring of an easement for slopes along the line of East Third street."

Upon the trial the defendant also admitted that prior to October 1, 1893, the contract for doing the work of grading on East Third street from Earl street to the east city limits was rescinded by the city. In its answer the defendant says (referring to Hennessy's objection to the assessment upon his land) that

"Thereafter such proceedings were had in this court that an order and judgment were entered in said cause so appealed to this court by said Hennessy, in all things annulling the assessment as made by said board of public works, in so far as it related to said real estate designated as section 35 aforesaid."

The trial court found as a fact,

"That the defendant has, through its said contractors, done some work on said street east of said Clarence street; but has never completed said street east of said point so that it is capable of being traversed either by teams or foot passengers; that in June, 1893, the defendant ceased entirely work on said street, wholly abandoned said projected improvement, and has never completed the same east of said Clarence street; that the plaintiff's said property is situated between Bock and Kennard streets, which are to the east of Clarence street, and that the nearest of plaintiff's said lots to Clarence street is about one-half mile east of said Clarence street; that between said Clarence street and the first of plaintiff's said lots next east thereof are two deep holes, and that access to plaintiff's property cannot be had over said Third street as the same has been left

by the defendant; that, had said improvement been completed as projected, access to plaintiff's said property from the center of St. Paul and to the east city limits would have been secured therefrom, and said property would have been benefited thereby to the amount of the assessment imposed as aforesaid, to wit, in the sum of twelve hundred and thirty-three dollars and fifty cents (\$1,233.50); that the grading of said street to the extent actually done is not, and at no time has been, of any benefit whatsoever to the plaintiff's said property; that the allegations of the pleadings, save as hereinbefore found, are not sustained by the evidence."

The court found as conclusion of law that plaintiff was entitled to recover from the defendant the sum of \$1,294.43, and legal interest from August 24, 1892. From an order denying a motion for a new trial, the defendant appeals.

The defendant contends that the evidence does not sustain the finding of the trial court that the improvement of East Third street was abandoned by it. We are of the opinion that this contention is not well founded. There is no claim made in defendant's answer, and none was made on the trial, or on the argument in this court, that defendant wishes, desires or ever intends to grade, widen or improve said Earl street, or the proposed street over the Hennessy land. In fact, no substantial proceedings were ever instituted by the defendant with a view to further carrying on the original proceedings instituted in January, 1891. It is true, the city council, after plaintiff had remonstrated with it on account of its delay in the matter, directed the board of public works to investigate the feasibility of completing the grading of East Third street, not from Clarence street to the east city limits, as contemplated by the original petition, but to White Bear avenue, which is a mile west of the east city limits, and even this proceeding was substantially abandoned; and the plaintiff, fearing that an action for his claim for the money so paid to the defendant would be barred by the statute of limitations, brought this action January 31, 1898.

The evidence is quite conclusive that the plaintiff's lots have not been benefited by the grading, or any acts done under the proceedings instituted by the city for such purpose. The city, by judicial proceedings, compelled him to pay to it the full amount of the

assessment; and, with commendable forbearance, he waited nearly six years for the city to complete its work after obtaining his money in August, 1892, which it keeps without the slightest evidence of its intent to complete its work of grading and improving the street named. If it intends to complete this work, it should do so or say so. We do not approve of a great and wealthy city remaining passive, inactive, and its officers silent, upon such matters of public concern, for so long a period, to the great injury of one of its citizens, especially without signifying its intent to proceed with the projected improvement. He had a right to elect to have them act promptly, and determine whether they would abandon or not. Mills, in his work on Eminent Domain (312), says that there should be no unreasonable delay in determining whether or not the proceedings shall be abandoned, and that the public must be held to a speedy and prompt termination of the proceedings. It is to be noted that this is not a case of attempting to condemn and appropriate land for city purposes where the city takes and keeps possession of the property, and has not paid the damages, and where possession would be evidence that it had not abandoned the undertaking.

It is evident that the undertaking was an unwise one, and the expense entirely beyond the resulting benefits to all the property involved; the delay of six years is *prima facie* evidence that the improvements were unnecessary, and doubtless justified the city in abandoning the work. Lewis, in his work on Eminent Domain (section 657), says:

"In most of the cases which have arisen, the intention to abandon has been manifested by affirmative acts. But this intention may be manifested in other ways. Where a statute required the final order establishing a highway to be filed with the town clerk within ten days from its date, a failure to do so was held to constitute an abandonment of the proceedings. Where a motion to accept an award was made and lost in a county board, it was held to amount to a vote to abandon. The failure to pay the damages within a reasonable time after their final determination will itself constitute an abandonment of any right to take the property under the proceedings had. What will constitute a reasonable time must, of course, depend upon circumstances. Four years has been held to be an unreasonable delay, constituting an abandonment; and in the

same case it is said that after one year, no offer to pay having been made, the assessment would become *functus officio*."

We are of the opinion that the facts in the case fully justify and sustain the findings of the trial court that the defendant city had abandoned the grading of East Third street as contemplated in the proceedings under which the assessment was made and levied, and that, as the plaintiff has received no benefit or consideration for the money paid by him to the city by coercion of law, he can maintain this action to recover it. *Valentine v. City of St. Paul*, 34 Minn. 446, 26 N. W. 457. This being so, it is not necessary for us to consider the question as to whether the plaintiff has a remedy by mandamus to compel the board of public works to proceed with the improvement. If he had such a remedy, it was not an exclusive one.

The appellant claims that the rule laid down by this court in the case of *Strickland v. City of Stillwater*, 63 Minn. 43, 65 N. W. 131, is not applicable to the case at bar, or that, if it is, it should not be adhered to. In that case the city adopted a general plan for grading parts of the several streets, which included that part of a street in front of Strickland's lots, and extending beyond the same in each direction. The assessment included her property, and all other property benefited by such grading, although not abutting on the improvement. Part of the contemplated grading was done, but none in front of her property, and the street was graded nearly up to her property. The city abandoned doing any further work, although she had paid the full amount of her assessment for making the entire improvement; and she sued the city for the sum so assessed and paid, and recovered judgment for the full amount, upon the ground that her property had been assessed upon the basis of frontage, and, no grading having been done on the street in front of her abutting property, she was entitled to recover the whole sum paid by her as benefits. This court held that this was error, but that as her property was so assessed, and it having been done in pursuance of a general plan which included an assessment upon all property benefited by such improvement within the limits of such plan, she might have been benefited by such grading done in part, although none of it was done directly in front of her property,

and, if so, her property was liable for the amount of such benefit, whatever it might be, and that whatever sum she was entitled to receive, if any, would be the difference between the actual benefits added to her property by the grading as an entirety, so far as done, and the sum which she was compelled to pay to said city of Stillwater.

We think this rule a sound and equitable one, protecting the rights of the citizen, and imposing a duty upon the municipality to perform its obligations. The principle upon which that case rested is applicable to the one at bar; that case differing from this only in the fact that in the Strickland case the plaintiff received some benefit from the partial performance of the improvement, and in this the plaintiff received none. The counsel for the appellant contend that, if the rule in the Strickland case is to be adopted as the law of this state, some peculiar situations will result. Any such conditions can be easily avoided by municipal corporations fully, completely and honestly performing their duties and obligations, and not sheltering their defaults behind the plea of non-accountability. The doctrine in the Strickland case is adhered to. Our conclusion is that the plaintiff is entitled to recover in this action from the defendant city the amount so paid it by him, with interest, as upon failure of consideration.

Order affirmed.

CANTY, J. (dissenting).

I cannot concur. The majority assume that they are following Strickland v. City of Stillwater, 63 Minn. 43, 65 N. W. 131, but the facts in that case were wholly different. There it was not claimed that any money was squandered or spent foolishly. Every dollar expended returned a full dollar's benefit to the property holders, but the city in fact abandoned a part of the improvement district and a part of the improvement. That action was brought on the theory that the plaintiff's property was wholly without the limits of any assessment district which the city authorities were warranted in carving out for the purpose of assessing thereon the cost of the improvements as actually made. We held that the property was not outside such an assessment district, but that as the assess-

ment district was in fact changed by the abandonment of the improvements in a part of it, and the improvements also changed, the court or the jury must in this action make a new assessment to meet these new conditions, and determine the amount of benefit to plaintiff's property and award him the balance assessed against the property.

Here the plaintiff is not outside of the assessment district, or on the edge of it, where his assessment should be lighter, but he is in the very midst of it; and it is not claimed that the change made in the district by the abandonment of the improvement of the street through the Hennessy tract before any improvement was made in that part of the street could in any event make the assessment against plaintiff's property any the less. But this action is brought upon the theory that when a special tax is levied on property specially benefited by an improvement, to defray the cost of making that improvement, and the money is spent in the improvement, but the city does not complete the same, and it turns out, in the light of subsequent events and subsequent experiences, that the improvement was an injudicious undertaking, the taxpayer can recover from the city the money thus injudiciously spent in the abortive enterprise. On the same principle, if a general tax of, say, five mills on the dollar, was levied to build a court house, and the money was all spent in building a court house on such a foolish plan that before it was completed it fell down and became a total wreck, any taxpayer who paid his part of the tax could immediately recover it from the county.

There is no difference in this respect between a special tax on property specially benefited and a general tax on all the property in the city or county. Each is levied by the same sovereign power. That power acts in its sovereign capacity, not in its private or contractual capacity, in levying such a tax, and therefore is not liable for the failure of the tax to bring any benefit to him who pays it. True, the special tax is levied on the supposition that the party paying it is benefited to an amount equal to the amount of the tax. But the question of whether he is or will be thus benefited is tried at the time the assessment is made, and cannot be subsequently reviewed in an action brought to recover the tax after it is paid,

merely because the improvement was injudiciously undertaken. Of course, where the assessment district and the improvements are changed after the tax is levied and collected, so that one taxpayer has paid more than his share, he may recover the excess. Such was the Strickland case. But here he is allowed to recover taxes collected and squandered in the construction of abortive improvements. A part of the tax so collected has not been expended, and I concede that plaintiff may recover such part; but the tax was not collected with an implied warranty that it would bring to the taxpayer the benefit contemplated, and for the portion of it which has been spent he has, in my opinion, no claim against the city.

STATE ex rel. ALONZO PHILLIPS v. CHARLES B. ELLIOTT.

January 27, 1899.

Nos. 11,530—(270).

Perpetuating Testimony—Election Contest.

G. S. 1894, § 153, in relation to elections, reads as follows: "When the canvass shall have been completed, and as soon as practicable thereafter, in the presence of all the judges, each box shall be locked and sealed by pasting firm paper across the lid and body of each box in such a manner that the box cannot be opened without breaking the seal; and each judge shall write his name upon said paper in such place that the box cannot be opened without tearing the name. Said sealings shall not be done, however, until it shall have been ascertained, by a canvass of the ballots in all the boxes, that all the ballots so to be sealed up in said box have been placed therein; but the same shall in all cases be done before the board shall separate or adjourn." Section 154 of said statutes, in part, reads as follows: "Each ballot box, as soon as practicable after the same is sealed as provided in the last preceding section, shall be deposited in the office of the town, city or village clerk, and carefully preserved therein with unbroken seals until the next general election, unless sooner opened by the proper authority for a recount or for examination," P., the relator, claiming to have been duly elected to the office of sheriff of Hennepin county, on November 8, 1898, for the term of two years, commencing on January 1, 1899, petitioned E., the district judge of said county, to have the deposition of L., city clerk of the city of Minneapolis, taken, for the purpose of perpetuating the evidence relating to and con-

tained in the ballots cast at said election for said office of sheriff, and which ballots were then in the sealed ballot boxes, and in the official custody of said L., as city clerk. *Held*, that the taking of such testimony did not come within the scope of G. S. 1894, c. 73, tit. 4, providing that, when any person is desirous to perpetuate the testimony of any witness, a judge of a court of record should cause such deposition to be taken.

Alternative writ of mandamus issued from the supreme court requiring respondent, as judge of the district court for the fourth judicial district, to show cause why he should not take the deposition of L. A. Lydiard, city clerk of the city of Minneapolis. Writ quashed.

A. B. Jackson, Moses E. Clapp and E. R. Lynch, for relator.

A. Y. Merrill and John H. Steele, for respondent.

BUCK, J.

The relator, Alonzo Phillips, on December 30, 1898, presented a verified petition to the defendant, Charles B. Elliott, one of the judges of the district court in and for the fourth judicial district in the county of Hennepin, and requested said judge to take the deposition of L. A. Lydiard, city clerk of the city of Minneapolis, and to cause notice to be given of the time and place appointed for taking of said deposition, and to proceed therein as prescribed by G. S. 1894, c. 73, tit. 4 (§§ 5693-5698).

In support of said petition, and as grounds therefor, the petitioner alleged that he was duly nominated for the office of sheriff of the county of Hennepin, to be voted upon at the general election in said county on November 8, 1898; that his name was lawfully upon the ballots by which the electors of said county voted for the office of sheriff at said election; that he was voted for by said electors for said office of sheriff of Hennepin county, the term thereof to begin on January 2, 1899; and that he received a plurality of all the votes cast by the electors of said county at said election for the said office of sheriff. And he alleged in said petition that he was entitled to the certificate of election to said office, and entitled to hold and discharge the duties thereof for said term, but that one Philip T. Megaarden received from the county auditor of said county a certificate that the said Megaarden was elected to said

office for said term. The relator further alleged that he intended to contest said election, and appeal from the board of canvassers, in the manner provided by law, and took the necessary steps for such purpose; but that said Megaarden secured the dismissal of said contest and proceedings therein, upon the ground that said petitioner had failed to comply with the provision of the statute which requires that an appeal be entered with the clerk of court within 20 days after the election; but that said failure to enter said appeal was through no fault of his own, and that he intended to prosecute the same to a final determination, and that it was his bona fide intention to institute proceedings to bring an action to secure said certificate of election to said office, and to secure said office.

He further alleged that L. H. Lydiard, the city clerk of the city of Minneapolis, has in his possession all the ballots that were cast at said election in said city of Minneapolis; and that he is informed and believes that said Lydiard can testify from said ballots, and upon and from the inspection of the same, that the petitioner received such plurality of all the votes cast by the electors within said city of Minneapolis for said office of sheriff for said term of said election as will show, not only that he (Phillips) did receive a plurality of all of said votes in said city, but that he received a plurality of all the votes cast by the electors of the county of Hennepin for said office of sheriff for said term; and that the relator was desirous of perpetuating the testimony of said Lydiard concerning this petitioner's claim to said certificate of election and said office; and that the only other person interested in the petitioner's claim to said certificate and said office is Philip T. Megaarden, who is a resident of said city of Minneapolis.

Judge Elliott refused to take such deposition, and the present application is for a peremptory writ of mandamus requiring said judge to proceed with the deposition, as provided by the statute. Upon the relator's application, this court issued an alternative writ of mandamus requiring Judge Elliott to show why he should not proceed to take the deposition of said Lydiard. Judge Elliott appeared and answered.

Does this application come fairly within the scope of the provisions of G. S. 1894, c. 73, tit. 4, authorizing the perpetuation of the

testimony of witnesses within the state? Section 5693 of said statute provides:

"When any person is desirous to perpetuate the testimony of any witness, he shall make a statement in writing, setting forth briefly and substantially his title, claim or interest, in or to the subject concerning which he desires to perpetuate the evidence, and the names of all other persons interested or supposed to be interested therein, their residences, if known, and if unknown it shall be so stated, and also the name of the witness proposed to be examined, and shall deliver the said statement to the judge of a court of record, requesting him to take the deposition of the said witness."

Subsequent sections further provide the method of procedure for recording the deposition in the office of the register of deeds, when it may be used, and authorize a subpoena to issue to compel a witness to give his deposition in perpetual remembrance of the thing as presented.

The sections are undoubtedly intended to take the place of the old equitable bill in perpetuam rei memoriam. Its object was to preserve evidence, to assist courts, and prevent future litigation, and especially to secure and preserve such testimony as might be in danger of being lost before the matter to which it related could be made the subject of judicial investigation. The origin of this practice, it is said, has been traced to the canon law, which, taking hold of men's consciences, extended its right to all cases in which it was important, in the interests of justice, to register testimony which would otherwise be lost. 2 Am. & Eng. Enc. 277, note 3. It was necessary, however, in the proceedings by bill in equity, to show some reason and necessity for perpetuating the testimony; as that the facts could not be investigated in a court of law, or that some impediment had been interposed to an immediate trial of the suit, or that there was danger that the evidence of a material witness might be lost by his absence or death. For these purposes, the common law did not afford any or sufficient remedy, and hence litigants or intended litigants invoked the auxiliary jurisdiction of equity in perpetuating the desired testimony as to some matters which would likely be necessary at some future time, if litigation therein should be instituted. A deposition, while author-

ized by statute, is still considered as secondary evidence, the primary evidence being that given orally by the witness in court; and where the witness whose deposition is thus obtained is within the jurisdiction of the trial court, and is able to appear and testify, the reason for taking his deposition no longer exists. *Weeks*, Dep. § 457; *Atkinson v. Nash*, 56 Minn. 472, 58 N. W. 39; *Booker v. Booker*, 20 Ga. 777.

Taking the facts in the case, can it be held that it appears therefrom that it is the intent and object of the relator to preserve the testimony sought, by taking the deposition of the clerk Lydiard? He knows nothing of the material facts in the case, and it is not claimed that he does know any such facts. He is simply the custodian of the ballot boxes containing the ballots, which it is claimed are important evidence in the contemplated proceedings on the part of the relator. But, if he continues to be the clerk, his testimony can be secured on the trial of any future action, and hence his deposition is unnecessary. Any clerk succeeding him would be the custodian of the same ballot boxes, and his testimony could also be secured on any such trial. As to the ballots cast for the relator and Megaarden for the office of sheriff, the law already secures and preserves them. G. S. 1894, § 153, reads as follows:

“When the canvass shall have been completed, and as soon as practicable thereafter, in the presence of all the judges, each box shall be locked and sealed by pasting firm paper across the lid and body of each box in such a manner that the box cannot be opened without breaking the seal; and each judge shall write his name upon said paper in such place that the box cannot be opened without tearing the name. Said sealings shall not be done, however, until it shall have been ascertained, by a canvass of the ballots in all the boxes, that all the ballots so to be sealed up in said box have been placed therein; but the same shall in all cases be done before the board shall separate or adjourn.”

And section 154 of said statutes has this provision:

“Each ballot box, as soon as practicable after the same is sealed as provided in the last preceding section, shall be deposited in the office of the town, city or village clerk, and carefully preserved therein with unbroken seals until the next general election, unless sooner opened by the proper authority for a recount or for examination.”

There is no danger of the destruction or loss of these ballot boxes, or the ballots themselves. Their safe-keeping is already made as effectual by statutory law as it could possibly be made by any judicial proceedings through a deposition. It is the duty of a sworn officer to keep the ballot boxes intact, with an unbroken seal upon them, for two years. The term of office of sheriff is only two years, and during that time he must necessarily commence his action, in order to become entitled to the possession of it, if at all; and for such purpose the clerk, as custodian of the ballots, could be compelled to appear personally as a witness in court, and give his testimony therein, as well as to produce such ballots in a pending action; and in such case the deposition could not be used. This is, in fact, a proceeding to discover evidence,—not to preserve it.

Our conclusion is that the relator has not presented such a state of facts as to bring his case within G. S. 1894, c. 73, tit. 4, relative to proceedings to perpetuate the testimony of witnesses within the state, and that the writ should be quashed. It is so ordered.

FIRST NATIONAL BANK OF SHAKOPEE v. H. BURTON STRAIT.

January 30, 1899.

Nos. 11,373—(234).

Verdict Sustained by Evidence.

Evidence *held* to justify the verdict.

Admission of Evidence—Charge to Jury—Court Sustained.

Numerous exceptions to the rulings of the trial court in the admission of evidence and to its charge to the jury considered and disposed of.

Appeal by defendant, as administrator of the estate of Horace B. Strait, deceased, from an order of the district court for Scott county, Cadwell, J., denying a motion for a new trial, after a verdict in favor of plaintiff for \$8,875. Affirmed. The inventories mentioned in the opinion were introduced in evidence to show that the firm

note, after execution by How of the renewal notes, was included therein and continued to be treated by the bank as an asset.

J. A. Collier, and E. & W. N. Southworth and Warner, Richardson & Lawrence, for appellant.

Chas. G. Hinds and Henry Hinds, for respondent.

MITCHELL, J.

This case has already been twice before this court, first in 65 Minn. 162, 67 N. W. 987, where a verdict for the plaintiff was set aside because of error in admitting incompetent evidence, and again in 71 Minn. 69, 73 N. W. 645, where a verdict for the defendant was set aside because of the admission of evidence which was inadmissible under the pleadings. A third trial resulted in a verdict for the plaintiff, and this appeal is from an order denying defendant's motion for a new trial, on the grounds that the verdict was not justified by the evidence, and of errors of law occurring on the trial.

The two defenses, it will be remembered, are payment and the statute of limitations; but before the last trial a general plea of payment was substituted for the special one referred to in the opinion on the second appeal. The only payment relied on at the trial was the alleged execution by How of his individual note, and its acceptance by the plaintiff bank in absolute payment of the note of the firm of G. F. Strait & Co. (of which both How and H. B. Strait were members), upon which plaintiff's cause of action is founded. This firm note having matured January 1, 1886, and H. B. Strait, whose estate is defendant in this action, not having died until February 25, 1894, the plaintiff sought to bring the case within the provisions of G. S. 1894, § 5136, subd. 6, on the ground of fraud in concealing from the board of directors the fact that the note had not been paid. While some items of new evidence were introduced on the last trial, we cannot discover that the evidence, taken as a whole, materially differed in its probative force from that introduced on the former trials. It is so voluminous and of such a character that it is impracticable, if not absolutely impossible, to discuss and analyze it exhaustively, and anything short of that would be unprofitable, and, indeed, positively misleading. On this branch

of the case, we shall therefore content ourselves with saying merely, that, in our opinion, the evidence made a case for the jury on both issues.

1. The closest question in the case, under the evidence, is perhaps upon the statute of limitations. There was unquestionably plenary evidence to justify the jury in finding that the nonpayment of the note was fraudulently concealed from the board of directors, and that the latter did not actually discover the fraud until within six years prior to the death of Strait. Of course, the question remained whether the board of directors could not, and ought not, in the exercise of reasonable diligence, to have sooner discovered the fraud. But Strait was himself a director and the president of the bank in 1885, when the firm note was executed, and so continued until January 1, 1892, and How was a director and the cashier of the bank in 1885, and so continued until his death on December 22, 1893. In view of their fiduciary relations to the bank, the affirmative duties to it resulting from those relations, and the confidence which directors naturally, and to a certain extent must, repose in the executive officers of the bank, we think the whole question was one for the jury. As both Strait and How were personally interested in the matter, notice to them would not be notice to the bank.

2. It only remains to consider the assignments relative to alleged errors of law occurring on the trial. As these are very numerous, we shall only refer to a few which seem the most important, and dismiss the others by merely saying that we think that they are without merit. These assignments are of two classes: First, those relating to the admission of evidence; and, second, those relating to the charge of the court.

The inventories referred to in the first and second assignments of error, which were made by How or under his direction, and were by him submitted to or read to the board of directors, were competent upon the question whether How had executed his individual note as a substitute for and in payment of the firm note, and whether the board of directors had accepted it as such. It must be kept in mind that the amendment to the answer had introduced a new element into the case, viz., whether the firm note had been

paid by the execution and acceptance of the individual note of How. This involved the acts and intentions of both How and the board of directors in that regard, and rendered them material and competent evidence on that question, wholly irrespective of the former partnership between Strait and How. On the first trial, acts or admissions of How made after the dissolution of the partnership were admitted in evidence against Strait's estate, for the purpose of establishing fraud on Strait's part, and we held that this was error. But in this instance the act of How was not admitted for any such purpose, but upon the issue of payment. This disposes of several of the assignments of error, especially the twenty-second.

The introduction in evidence of admissions of counsel made on the former trial, if error, was without prejudice, for the reason that the facts to which they related were conclusively proved, independently of the admissions. The only objection made to the evidence referred to in the nineteenth assignment of error was that it was not proper redirect examination. Conceding that it was not, it was nevertheless within the discretion of the court to permit it.

The objection urged to the admission of the evidence referred to in the twenty-first assignment of error is that it must have been based on conversations between the witness and How, then dead, and was therefore inadmissible under the statute. Conceding this to be so, counsel for the defendant had waived the statute by having himself gone into the same matter in his examination of the witness.

We shall now consider some of the objections to the charge of the court. The court did not charge the jury that it was incumbent on the defendant to prove an express agreement on part of the bank to accept How's note in payment of the firm note. That is not the fair construction of the part of the charge quoted in the twenty-third assignment of error. Such was clearly not the meaning of the court, and it could not have been so understood by the jury, in view of other parts of the charge. In the part quoted, the court expressly instructs the jury that no express agreement had been proved. This being so, if the court had intended to hold that an express agreement was necessary, he would have instructed the jury, as a matter of law, that the defense of payment had not been

proved, and taken that issue away from them altogether. After saying that the defendant must prove an express agreement, the court immediately added,

"Or that the plaintiff bank, by its board of directors or other officer or officers than Strait or How, confirmed and approved, in some way, of the substitution of the How note for the note in suit," etc.

Other portions of the charge clearly show that the question of an implied confirmation or approval of the substitution was left to the jury under proper instructions.

Exception is also taken, under the twenty-fifth assignment of error, to the instruction of the court to the effect that it is a constructive fraud upon a bank for its cashier, president or any director having knowledge of a cause of action, or a demand in its favor against himself, not to make known the existence of such cause of action to the governing body of the bank, which, in the case of a national bank, is the board of directors; that the duty of such bank officer requires, in such case as this, that he communicate to such body the facts relating to the demand or cause of action, and, if he fails to do so, the right of action of the bank does not accrue so as to set the statute of limitations in motion, until such information is obtained by the board of directors. We may concede, without deciding, that this statement of the law would be too broad, as an abstract proposition of universal application, without reference to the particular facts of the case or the nature of the duties of the bank officer. But there was certainly no error in the instruction as applied to the particular facts of this case.

Strait, the president, and How, the cashier, were jointly liable to the bank on the firm note. There is no claim or pretense that it was ever paid, or any provision ever made for its payment, except by the individual note of How, and defendant contends that the circumstantial evidence tends to prove that there was an understanding between Strait and How that the latter should take care of the firm note in that or some other way, and that Strait intrusted the whole matter to How, his codebtor, as well as the cashier of the bank. In view of the long-continued custom in that regard, Strait may

have had a right to assume in good faith that How had authority to lend the money of the bank to the firm of which he himself was a member, and also to renew such loans; but he must have known, and was bound to know, that How, as cashier, had no authority to accept, in behalf of the bank, his own individual note as payment of a firm note, and that an attempt to do so, without express authority from the board of directors, would be an actual, and not merely a constructive, fraud on the bank. Under these circumstances, we think that Strait owed the bank the affirmative duty to see to it that How did pay the firm note, or to inform the board of directors that he had not done so, and that the note was still unpaid, and, if How assumed, as defendant claims he did, to pay it by substituting his own note, to inform the board of directors of the fact, and ascertain whether they had confirmed and approved, or would confirm and approve, the substitution. It was this state of facts to which the charge of the court was directed; and, as thus applied, it was correct.

A word in regard to the part of the charge referred to in the twenty-seventh assignment of error. The "firm" note, to which we have heretofore always referred, and generally referred to on the trial, as "C1," and the one upon which plaintiff's action is based, was executed October 13, 1885. It appeared from the evidence that this note was taken by How, as cashier, in renewal of a prior note of the firm to the bank. We may be pardoned for saying that we think the learned counsel for the plaintiff, in pleading his cause of action, ought to have started out with the last note, and based his cause of action on that and what was subsequently committed or omitted, for that is what the whole case came down to on the trial; but, instead of doing this, he incorporated into his complaint an allegation that the acceptance of this renewal note was unauthorized, and in violation of the duties of Strait, as president, and of How, as cashier, because they, being personally interested in, and parties to, the transaction, had no authority to act for the bank. We assume that it was to this that the court referred in the part of the charge complained of. In view of the entire evidence, and the theory upon which the case was tried throughout, we cannot see that this instruction had any relevancy to the case; but, for the

same reason, we are unable to see how, whether right or wrong as an abstract proposition, it could have prejudiced the defendant, especially in the light of the charge as a whole.

Exception is also taken to the instruction of the court that "so far as the plaintiff is concerned, the firm of G. F. Strait & Co. was dissolved on May 30, 1887, the time of the death of G. F. Strait [one of the partners] and not before." Under the evidence, this was correct. There was no evidence that there was any dissolution of the partnership before that time by the voluntary act of the partners. Neither is there any evidence that any notice of dissolution had been given to the bank, which was an "old customer." The burning of the flouring mill, and ceasing at that time to carry on the milling business, did not work a dissolution of the partnership. There is affirmative evidence that the firm did continue, at least for the purpose of closing up its business, of which this very note was a part. It also appears that the partners, including Strait himself, continued to make deposits in, and draw checks on, the plaintiff bank, in the firm name. There was no evidence rebutting, or in any way impairing the force of, these facts. This covers all the points that we deem it necessary to discuss.

Order affirmed.

CLARA H. STRANAHAN v. WILLIAM E. RICHARDSON and Another.

January 30, 1899.

Nos. 11,407—(251).

Contract by Married Woman—Guarantied Profits in Real-Estate Investment—Trust.

The plaintiff (a married woman) and the defendants entered into a written contract (plaintiff's husband not joining) by which the plaintiff was to intrust to the defendants a specified sum of money, which they were to invest in real estate, taking the title in her name, and were also to take care of, manage and sell the property, and out of the proceeds repay her the amount of her investment, with interest, and the remainder, or net profits, was to be equally divided between the parties. The defendants further agreed that, if such profits did not amount to at least 8

per cent. per annum they would pay plaintiff such sum as would make the profits equal to that amount. The property having proved inadequate to repay the plaintiff her investment with interest in full, she brought this action against defendants on their guaranty to recover the deficiency. *Held*, that the contract was valid and enforceable by either party against the other, notwithstanding that plaintiff's husband did not join in its execution; that, the real estate having been acquired under, and subject to the conditions of, the contract, the plaintiff held the title in trust for the defendants to the extent of their interest in the deal; and the provisions of the married woman's act in relation to contracts for the sale of her real estate would not apply, as against defendants' interest, according to the contract under which the property was acquired.

Same—Taxes Advanced by Plaintiff.

Also, money advanced by plaintiff, and used by the defendants in paying taxes and incumbrances on the property purchased, was a part of the investment, and covered by defendants' guaranty, the same as the purchase money paid to the vendors.

Action in the district court for St. Louis county to recover \$5,103.42, and interest, on a written contract. The court, Cant, J., found in favor of plaintiff, and from a judgment in her favor for \$4,297.04 entered pursuant to the findings, defendants appealed. *Affirmed*.

R. R. Briggs, for appellants.

The contract, so far as it related to real estate purchased by plaintiff through agents, was valid; but its provisions relating to the selling of the real estate are absolutely void, because it was not signed by her husband. *G. S. 1894, § 5532; Gregg v. Owens, 37 Minn. 61.* The invalidity of such contract is based on want of power to make it. *Place v. Johnson, 20 Minn. 198 (219); Nell v. Dayton, 43 Minn. 242; Yager v. Merkle, 26 Minn. 429; Tatge v. Tatge, 34 Minn. 272; Steele v. Anheuser-Busch B. Assn., 57 Minn. 18; Althen v. Tarbox, 48 Minn. 18.* Plaintiff authorized defendants to sell at such times and on such terms as seemed proper to them. But for the statute married women would be under their common-law disabilities. *Nash v. Mitchell, 71 N. Y. 199.* If the contract to sell is valid, the agents could execute in plaintiff's name the memorandum of agreement required by the statute of frauds. *Romans*

v. Langevin, 34 Minn. 312; Quinn v. Champagne, 38 Minn. 322. A married woman's agent can bind her only while acting within the limits of her capacity. Kenton v. McClellan, 43 Mich. 564; Nash v. Mitchell, supra; Mechem, Ag. § 56. The contract was not mutually binding, and hence could not be enforced. Alworth v. Seymour, 42 Minn. 526; 3 Pomeroy, Eq. Jur. § 1405; Bailey v. Austrian, 19 Minn. 465 (535); Butman v. Porter, 100 Mass. 337; Tarbox v. Gotzian, 20 Minn. 122 (139). The contract provides for the investment of \$2,200 and no more.

Alford & Hunt, for respondent.

MITCHELL, J.

All the assignments of error go to the sufficiency of the findings of fact to support the conclusions of law. The action was brought upon a written contract executed by the defendants and the plaintiff, a married woman, whose husband did not join in its execution. The contract is set out at length in the findings, but the general features may be briefly stated thus:

The plaintiff agreed to furnish the defendants \$2,200, to be by them invested in real estate in or near Duluth, the title to be taken in her name. The defendants agreed to make the investment, manage and control the property, pay the taxes on it (out of money to be furnished by the plaintiff), and sell the property, and out of the proceeds there should be repaid to the plaintiff the amount invested by her with 8 per cent. interest per annum from the date of the investment, and then the net profits, if any, to be divided equally between the parties. The plaintiff agreed not to require the property to be sold within five years, but if, at the end of five years, any of the investment remained unsettled, it should be closed out within a reasonable time after written demand by the plaintiff to that effect. In consideration of this, the defendants agreed, within a reasonable time after the five years, at the request of the plaintiff, to dispose of the property, and return to the plaintiff the amount of her investment with 8 per cent. interest, together with one-half the profits, "and, if such profit does not amount to at least eight per cent. per annum, second parties [the defendants] will pay to first

party [the plaintiff] such sum as will make the profit equal to eight per cent. per annum on the investment."

When the five years elapsed, the investment had not been closed out, part of the property remained unsold, and the plaintiff had been repaid only a part of her investment. She thereupon requested the defendants to close it out, and sell the balance of the property, and this they had failed to do, although a reasonable time after demand had elapsed. Thereupon the plaintiff brought this action, to recover such sum as will, after crediting the value of the property still on hand and unsold, and the amount already repaid to her, repay her the amount which she has invested under the contract, with 8 per cent. interest from the date of the investment.

It is, perhaps, not quite clear from the contract, whether it means that defendants were to execute conveyances as plaintiff's attorneys, when sales were made, or whether they were merely to find the purchasers and make the sales, and the plaintiff herself execute the conveyances. This, however, is not important, as the court finds that plaintiff has in all respects fully performed her part of the contract, but that defendants have failed to perform their part. The court found that,

"Pursuant to the terms of said agreement, * * * and not otherwise, said plaintiff did upon said 5th day of May, 1888, upon the 29th day of November, 1892, and at divers days between said dates, advance, furnish and intrust unto said defendants divers sums of money, aggregating the sum of \$4,702.81; that said sums of money were so advanced, furnished and intrusted unto said defendants by the plaintiff solely upon said hereinbefore alleged agreement of said defendants to invest the said money in real estate pursuant to the terms of said agreement," and that \$2,200 of said sum was so furnished on the 5th day of May, 1888, and the remainder at various times thereafter.

One of the points made by the defendants is that their guaranty of the repayment of the principal invested and 8 per cent. interest only extends to the \$2,200 provided for in the written contract. But the finding of the court is clearly to the contrary. It can only mean that by mutual consent the amount of the investment was subsequently increased to \$4,702.81, and that the whole was furnished and accepted for the same purpose and on the same terms as

the original \$2,200. In the absence of a "case" or bill of exceptions, we must presume that every issue upon which the court has found, whether within the pleadings or not, was voluntarily litigated, and that there was evidence to support the finding. The court found specifically and in detail how and in what way the defendants invested and used the \$4,702.81, and from these findings it appeared that a part of it was used in paying taxes on the property purchased, and in paying off a mortgage subject to which some of it was bought. This they claim was not within their guaranty, but there is clearly no merit in this. The payment of taxes was expressly provided for in the contract, and the money thus expended, as well as that used to pay off an incumbrance on the property, was just as much a part of the investment as the money paid directly to the vendors.

Neither is there anything in the point that the court should have ordered the property on hand to be sold, instead of crediting the defendants, and charging the plaintiff, its present value. The time the contract was to run had expired, the defendants had failed and neglected to sell it as they agreed to do, and as a consequence the plaintiff had the property on hand, and she is entitled to a money judgment which, with the value of the property, will make her whole, and be the equivalent of defendants' guaranty had they performed.

But the main contention of counsel is that, while the provisions of the contract relating to the purchase of the real estate were valid, yet those relating to its sale were void, as being a contract for the sale of the real estate of a married woman in which her husband did not join; that for this reason the contract lacked mutuality of both obligation and remedy, and hence cannot be enforced against the defendants. This contention is plausible, but unsound.

This contract did not relate to any real estate which the plaintiff already owned. The parties went into a joint venture, by which plaintiff was to furnish a sum of money, and the defendants their services. The money was to be invested in real estate, and then sold; the parties were to divide the profits, after repaying to plaintiff the amount of money advanced by her, with interest; the defendants, however, personally guarantying to her repayment of the

same in any event, whether there were or were not any profits. All the real estate was acquired under this contract, and subject to all its conditions, and whichever party acquired the legal title took it in trust for the benefit of the other party, to the extent of her or their interest in the deal. Plaintiff never owned or acquired the property, except subject to this trust in favor of the defendants according to the terms of the contract. When a married woman acquires the title to real estate in trust, the provisions of the married woman's act (G. S. 1894, § 5532) do not apply, or, perhaps, to speak more accurately, they only apply subject to all the conditions of the trust. If this venture had proved a very profitable one, and the property was worth much more than its cost and interest, can there be any doubt but that the contract could have been enforced against the plaintiff, so as to enable the defendants to realize their share of the profits? The fact that the venture has proved a losing one, so as to render the defendants liable on their guaranty, does not alter the principle.

Judgment affirmed.

On April 10, 1899, the following opinion was filed:

PER CURIAM.

Upon application for a reargument counsel for defendants takes exception to the statement in the opinion of the court to the effect that the plaintiff acquired the title to the real estate in trust for the benefit of the defendants to the extent of their interest in the deal, and suggests that this proposition is in conflict with *Davis v. Peterson*, 59 Minn. 165, 60 N. W. 1007, to which he now for the first time calls our attention. The statement referred to, if not positively erroneous, is certainly misleading, because liable to be understood as meaning that defendants had an estate or interest in the corpus of the property itself, which clearly they had not. But this does not affect the result. If plaintiff had been a single woman, defendants could not have compelled her to sell the property, in order that they might realize out of the proceeds their share of the profits. If she had refused to sell, their only remedy would have been to sue her to recover their share of the profits, based upon and measured by what the property was reason-

ably worth, or would have probably sold for. Hence it is immaterial whether the plaintiff was married or single. In neither case could she have been compelled to sell the property, and in either case the fact that the agreement to do so was nonenforceable would not affect the validity or mutuality of the contract.

Application denied.

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GEORGE HUNTER v. BALTIMORE PACKING & COLD STORAGE COMPANY.

January 30, 1899.

Nos. 11,433—(197).

Verdict Sustained by Evidence.

Held, that the evidence justified the verdict.

Cold-Storage Warehouse Receipt — Exemption from Liability — Negligence.

A warehouse receipt issued by a warehouseman to his bailor, excepting the former from liability for loss from certain causes, construed, and *held* that the loss in this case did not result from any of the excepted causes.

Action in the district court for Hennepin county to recover damages resulting from the negligence of defendant in the manner of storing plaintiff's eggs and for conversion. The case was tried before Simpson, J., and a jury, which rendered a verdict in favor of plaintiff for \$2,214.29. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Arthur H. Noyes and *Rolla E. Noyes*, for appellant.

The bailee may show that the bailor approved of the place of storage and that the goods were damp. *Brown v. Hitchcock*, 28 Vt. 452. If the bailor agrees to the place or manner of storage, he cannot afterwards object that it was negligent to keep them in such place or manner. *Hale*, Bailm. 67; *McKay v. Hamblin*, 40 Miss. 472. Where he knows the place and manner in advance, he must be presumed to assent thereto. *Knowles v. Atlantic*, 38 Me. 55; *President v. American*, 8 Allen, 512; *Arthur v. St. Paul & D. R. Co.*,

38 Minn. 95; Schouler, Bailm. (2d Ed.) § 102. The terms of the special contract govern. Hale, Bailm. 51; McCauley v. Davidson, 10 Minn. 335 (418); Ferguson v. Porter, 3 Fla. 27; Archer v. Walker, 38 Ind. 472. A warehouseman's receipt brought to the customer's knowledge goes far to explain the nature of the undertaking. Schouler, Bailm. § 106; Hatchett v. Gibson, 13 Ala. 587; Patten v. Baggs, 43 Ga. 167. A writing which is both contract and receipt may be explained and contradicted as to what it recites, but not so far as it is a contract. Jones, Com. & T. Cont. § 187, and cases cited; Alcorn v. Morgan, 77 Ind. 184; Carpenter v. Jamison, 75 Mo. 285; Schultz v. Coon, 51 Wis. 416; McQuaid v. Ross, 77 Wis. 470; James v. Bligh, 93 Mass. 4; Sencerbox v. McGrade, 6 Minn. 334 (484); Cummings v. Baars, 36 Minn. 350.

Edmund S. Durment, for respondent.

If an exemption is stipulated for, it must be in unequivocal terms. New Jersey S. N. Co. v. Merchants Bank, 6 How. 344, 382; Mynard v. Syracuse, 71 N. Y. 180; Schouler, Bailm. (2d Ed.) § 446; Christenson v. American Ex. Co., 15 Minn. 208 (270); Bardwell v. American Ex. Co., 35 Minn. 344. If the warehouse receipts are contracts, the condition is illegal and of no force. Christenson v. American Ex. Co., *supra*; Shriver v. Sioux City & St. P. R. Co., 24 Minn. 506; Hutchinson v. Chicago, St. P., M. & O. Ry. Co., 37 Minn. 524; Hull v. Chicago, St. P., M. & O. Ry. Co., 41 Minn. 510; Shea v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 63 Minn. 228; Southard v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 60 Minn. 382, 387. Moreover, within the rule stated in the last case, the jury could find that there was no consideration for the agreement, since wagon receipts were first issued, and the warehouse receipts were issued subsequently.

MITCHELL, J.

In 1896 the defendant owned and was operating a cold-storage warehouse, the refrigerating process in use being the generating of cold by ammonia expanded directly into the pipe service of the rooms. In the spring of the year the plaintiff delivered to the defendant a large quantity of eggs for cold storage in its warehouse, where they remained during the summer and autumn. This action was brought to recover damages resulting from the alleged neg-

ligence of the defendant in the manner of keeping and storing the eggs, which resulted in a very material deterioration in their quality and value. As a second cause of action, the plaintiff alleged a wrongful conversion of part of the eggs, but, as this cuts no figure on this appeal, it need not be again referred to.

Inasmuch as plaintiff's agent, who announced himself to be an expert on the subject of cold storage, examined defendant's plant, and expressed himself as satisfied with it before the eggs were delivered, the plaintiff cannot and does not claim that the warehouse was not a proper place in which to store the eggs. His grounds of complaint are (1) that the defendant negligently permitted ammonia to escape from the pipes, which permeated the room in which the eggs were stored, and communicated its flavor to them; (2) that defendant negligently handled and stored fruit, especially lemons, in corridors and rooms in close proximity to that in which the eggs were stored, gases from which entered the room and communicated a bad taste to the eggs. Something was said on the trial about the defendant having neglected until midsummer to put a fan into the room to supply proper ventilation; but very little evidence was introduced upon this subject, and comparatively little importance seems to have been attached to it.

1. Defendant's first contention is that the verdict, which was in favor of the plaintiff, was not justified by the evidence.

The evidence is very voluminous, and, as might be expected, very conflicting. The plaintiff introduced evidence tending to prove that the eggs were in good condition when placed in store; that ammonia was allowed to escape into the building on at least two occasions; that fruit was stored and handled in the same building, and in proximity to the room in which the eggs were stored; that the gases from the fruit had opportunities to escape into that room; that this was improper and negligent, owing to the great susceptibility of eggs to take a flavor or taste from any such gases with which they come in contact; that, when the eggs were shipped out in the fall and winter, they were "tasty," having an acrid or sharp taste, different from what is called a "musty" taste; that the same was true as to other eggs stored in the warehouse during the same summer and autumn. On the other hand, defendant introduced

evidence tending to prove that some of the eggs were damp and unfit for storage at the time they were brought to the warehouse; that on the two occasions referred to the escape of ammonia was caused by an accidental breakage in the pipes; that the odor was very slight and of short continuance; that the gases from the fruit stored and handled in the warehouse could not have escaped into the egg room, and that other eggs stored in the same manner as those of plaintiff were found in good condition when sold and removed in the fall and winter.

Without discussing the evidence further, we are of opinion that it justified a verdict for the plaintiff.

2. The second contention of the defendant is that the three warehouse receipts issued by it to the plaintiff constituted a special written contract between the parties, limiting the common-law liability of the defendant, which could not be varied by parol, and therefore the court erred in submitting to the jury the question as to whether there was a special contract limiting defendant's common-law liability. The warehouse receipts, which were issued after the property was delivered for storage, were to the effect that the defendant had received on storage from the plaintiff so many cases of eggs, subject to his order, on payment of charges.

"All loss or damage by fire, water, ratage, leakage, breakage, frost, or to perishable property at owner's risk. This company will provide any desired temperature, but will not be responsible for results. Not responsible for shrinkage in weights."

Upon the record, the point made is not open to the defendant. In its answer it expressly alleges that the contract was verbal. On the trial the plaintiff was permitted to introduce, without objection, oral evidence as to the terms of the contract, consisting of all the conversations between the parties at and prior to the time the eggs were stored. The defendant, in rebuttal, did the same thing, giving its version of all these conversations. But, in any view of the case, the question is immaterial. Aside from the question of the validity of any agreement to exempt a warehouseman from liability for losses resulting from his own negligence, it is perfectly apparent, from the mere reading of these warehouse receipts, that the loss in

this case did not result from any of the excepted causes. Loss to "perishable property" clearly refers to loss resulting from the inherent qualities of the subject of the bailment. The clause, "but will not be responsible for results," refers exclusively to the results of the temperature requested by the bailor. This covers all of any importance or substance in the assignments of error.

Order affirmed.

CYRUS L. BROWN v. EQUITABLE LIFE ASSURANCE SOCIETY OF
THE UNITED STATES.

January 30, 1899.

Nos. 11,463—(248).

Life Insurance—Assignment of Policy without Consideration—Assignment by Assignee.

The defendant issued a policy of insurance on the life of the plaintiff, payable to himself in 20 years. Subsequently plaintiff assigned the policy to H., by a written assignment absolute in form, but in fact merely as security or indemnity for a loan which he agreed to procure for the plaintiff, but which he failed to do. H., however, remained in the possession of the policy, and subsequently assigned it to a bank as security for a loan, which he has never repaid. The bank made the loan relying on the absolute assignment from plaintiff to H., and believing, from an examination of it, that H. was the owner of the policy, and without any knowledge that plaintiff had any claim to it, or of any equities between him and H. When the policy matured, the defendant paid it to the bank, but with notice of plaintiff's claim. From the time the policy was assigned to H. until it matured, H. paid the premiums on it, which plaintiff has never repaid.

Equities of Insured—Estoppel.

1. *Held*, that the bank took the assignment of the policy subject to the equities between plaintiff and H., and that plaintiff was not estopped, as to the bank, to assert his rights, by the fact that he had executed and delivered to H. an assignment of the policy absolute in form.

Lien for Premiums Paid.

2. But *held*, also, that H. had a lien on the policy for the premiums he had paid; that this right passed to the bank by his assignment, and, to

the amount of the premiums paid by H., it was entitled to the money on the policy. And the payment by the defendant to the bank constituted a defense, *pro tanto*, to an action on the policy.

Upon Reargument.

July 11, 1899.

Assignments Valid.

Held, that the policy, being valid when issued, was assignable by plaintiff to H., and by H. to the bank.

Equities of Insured—Estoppel.

Also, that the bank would take the policy subject to the equities of the plaintiff, unless the conduct of the latter was such as to equitably estop him, but the mere fact that the assignment from him to H. was absolute in form would not create such an estoppel.

Laches of Insured.

But the laches of the plaintiff, and his practical abandonment of the policy for 11 years, by neglecting to take any active measures to recover it from H., and neglecting during all that time to pay the premiums necessary to keep it from lapsing, would estop him from asserting any rights under the policy, or attempting to avail himself of its benefits as against H. or his assignee, the bank, who had kept it alive by paying the premiums at his own expense.

Action in the district court for Hennepin county to recover the amount of a life insurance policy. The court, Johnson, J., found in favor of plaintiff for the sum of \$2,027, and interest, and from an order denying a motion for a new trial, defendant appealed. Reversed.

Hale & Montgomery, for appellant.

Plaintiff cannot take advantage of his own wrongful acts and laches, to defeat an innocent bona fide holder. *Fassett v. Smith*, 23 N. Y. 252. The assignee of a chose in action takes a perfect title, if the owner has armed his immediate assignee with evidence of absolute ownership, and has thereby misled such subsequent assignee into purchasing on the strength of the apparent ownership. The owner, having placed his immediate assignee in a position to commit the wrongful act, must suffer. *Cochran v. Stewart*, 21

Minn. 435; *McNeil v. Tenth*, 46 N. Y. 325; *Weyh v. Boylan*, 85 N. Y. 394; *Moore v. Metropolitan*, 55 N. Y. 41; *Colebrooke*, Coll. Sec. § 45; *Jones, Pledges*, § 466. By weight of authority, the owner of a life insurance policy issued on his own life may assign it, though the assignee has no insurable interest in the life; and the policy is assignable like any other chose in action, if it contains no provision to the contrary. *Ashley v. Ashley*, 3 Sim. 149; *Valton v. National*, 20 N. Y. 32; *Olmsted v. Keyes*, 85 N. Y. 593; *Travelers v. Healy*, 25 App. Div. (N. Y.) 53; *Clark v. Allen*, 11 R. I. 439; *St. John v. American*, 2 Duer, 419; *Bursinger v. Bank*, 67 Wis. 75; *Lemon v. Phoenix*, 38 Conn. 294; *Fairchild v. Northeastern*, 51 Vt. 613; *Mutual v. Allen*, 138 Mass. 24; *Harrison v. McConkey*, 1 Md. Ch. 34; *Souder v. Home*, 72 Md. 511; *Murphy v. Red*, 64 Miss. 614; *Currier v. Continental*, 57 Vt. 496; *Robinson v. U. S. Mut. Acc. Assn.*, 68 Fed. 825; *Langdon v. Union*, 22 Am. L. Reg. 385; *Martin v. Stubbings*, 126 Ill. 387; *Bloomington v. Blue*, 120 Ill. 121; *Eckel v. Renner*, 41 Oh. St. 232; *Hine & N. Assignment*, 73, 75, 81; *Bliss, Life Ins.* (2d Ed.) §§ 23, 26, 30; *Angell, Life Ins.* § 325. See *Hogue v. Minn. P. & P. Co.*, 59 Minn. 39. Cases holding the contrary doctrine hold that the policy may be assigned to secure a debt. The presumption is that the holder or pledgee is holder for value with good title. *Colebrooke*, Coll. Sec., §§ 431, 436-438; *Jones, Pledges*, § 146.

Even if *Hadley* had no insurable interest, and the assignment to him was illegal, so that he could not have enforced payment, and the bank had no insurable interest, plaintiff cannot raise these questions, because they were not raised by the insurance company. The case is the same as if the company had been sued on the policy, and had paid the money into court to await an adjudication whether plaintiff or the bank was entitled to it. *Standard v. Catlin*, 106 Mich. 138; *Milner v. Bowman*, 119 Ind. 448; *Meyers v. Schumann*, 54 N. J. Eq. 414. G. S. 1894, § 5273, provides only for a method of procedure, which may or may not be adopted. Defendant may raise the question of equitable estoppel to show ownership in the bank. See *Parker v. Crittenden*, 37 Conn. 148; *Krathwohl v. Dawson*, 140 Ind. 1; *Rose v. Teeple*, 16 Ind. 37; *Rose v. Hurley*, 39 Ind. 77; *Kinnear v. Mackey*, 85 Ill. 96. Plaintiff, having been guilty of gross negligence, is entitled to no consideration. *Gleason v. Dis-*

trict of Columbia, 127 U. S. 133. The notice on the policy would not prevent the bank from enforcing its claim against defendant, nor was it necessary for defendant to consent to the assignment to make it complete. See *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; *Hogue v. Minn. P. & P. Co.*, supra; 2 May, Ins. §§ 388-396; *Mutual v. Hamilton*, 5 Sneed (Tenn.) 268; *Bliss, Life Ins.* § 333; *New York v. Flack*, 3 Md. 341; *Marcus v. St. Louis*, 68 N. Y. 625.

Smith & Smith, for respondent.

Under the law as declared in *MacDonald v. Kneeland*, 5 Minn. 283 (352), and *Hogue v. Minn. P. & P. Co.*, 59 Minn. 39, the bank obtained no title by the assignment. There is no equitable estoppel to prevent plaintiff from denying the bank's title. There can be no such estoppel because the bank is not a party, and has no interest in the proceeding. No judgment in this case would affect the bank. Had defendant desired to have the rights of the bank considered, it should have brought the bank into court under G. S. 1894, § 5273. Defendant cannot assert title in a stranger, without first paying the money into court and summoning the alleged owner. *Truesdale v. Sidle*, 65 Minn. 315; *Birdsall v. Fischer*, 17 Minn. 76 (100); *Peck v. Snow, Church & Co.*, 47 Minn. 398. An estoppel available only to a stranger to the suit will not avail either of the parties. 7 Am. & Eng. Enc. 23. None of the elements of an equitable estoppel exist. 7 Am. & Eng. Enc. 12-23. An estoppel can never be allowed where it would itself perpetrate a fraud, work injustice or fail to protect the innocent. 1 Herman, Est. §§ 14, 20; *Mills v. Graves*, 38 Ill. 455; *Turnipseed v. Hudson*, 50 Miss. 429. Estoppel must be mutual. *Majenborg v. Haynes*, 50 N. Y. 675; *Maguire v. Selden*, 103 N. Y. 642; *Empire v. Moers*, 27 App. Div. (N. Y.) 464. See *Califf v. Hillhouse*, 3 Minn. 217 (311); *Combs v. Cooper*, 5 Minn. 200 (254); *Pence v. Arbuckle*, 22 Minn. 417; *Whitacre v. Culver*, 8 Minn. 103 (133); *Whitcomb v. Hardy*, 68 Minn. 265; *First v. Ricker*, 71 Ill. 439; *People v. Brown*, 67 Ill. 435; *Ball v. Hooten*, 85 Ill. 159; *Davidson v. Young*, 38 Ill. 145; *Dorlarque v. Cress*, 71 Ill. 380; *Chandler v. White*, 84 Ill. 435; *Thomas v. Bowman*, 29 Ill. 426.

Under the provisions of the policy, without the consent of the company no assignee can maintain an action on the policy; nor will

title pass without the written consent of the insurer. *Hogue v. Minn. P. & P. Co.*, *supra*; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85; *Merrill v. New England*, 103 Mass. 245; *Marcus v. St. Louis*, 68 N. Y. 625. An assignment without consent of the company, when consent is required, is invalid, and confers no title to the assignee as against the company, and the proceeds will be paid to the assignor or his heirs. *Unity v. Dugan*, 118 Mass. 219; *Commercial v. Treasury*, 61 Ill. 482; *Kase v. Hartford*, 58 N. J. L. 34; *Wilson v. Hill*, 3 Metc. (Mass.) 66; *Flanagan v. Camden*, 1 Dutch. 506; *National v. Lupold*, 101 Pa. St. 111.

While the insured may himself assign the policy to one having an insurable interest, or to secure a debt to one having no such interest, one who holds by assignment from the insured may not make a subsequent assignment to a person who has no insurable interest and is not a creditor of the insured. In the cases cited by defendant, except *Ashley v. Ashley* and *Souder v. Home*, the only question was whether the insured could make a valid assignment to his own assignee with or without insurable interest. The position here maintained by plaintiff is supported by the following authorities: 2 May, Ins. § 398; 2 Beach, Ins. § 850; 2 Joyce, Ins. § 889; *Trinity v. Travelers*, 113 N. C. 244; 3 Kent, Com. 368; *Warnock v. Davis*, 104 U. S. 775, 779; *Cammack v. Lewis*, 15 Wall. 643; *Stevens v. Warren*, 101 Mass. 564; *Corson Appeal*, 113 Pa. St. 438; *Gilbert v. Moose*, 104 Pa. St. 74; *Ruse v. Mutual*, 23 N. Y. 516; *Ruth v. Katterman*, 112 Pa. St. 251; *Price v. Supreme*, 68 Tex. 361; *Missouri v. McCrumb*, 36 Kan. 146; *Missouri v. Sturges*, 18 Kan. 93; *Cawthon v. Perry*, 76 Tex. 383; *Lewy v. Gilliard*, 76 Tex. 400; *Swick v. Home*, 2 Dill. 160; *Archibald v. Mutual*, 38 Wis. 542; *Rison v. Wilkerson*, 3 Sneed (Tenn) 565; *Page v. Burnstine*, 102 U. S. 664; *Downey v. Hoffer*, 110 Pa. St. 109; *Hodge v. Ellis*, 76 Ga. 272; *Stambaugh v. Blake*, 1 Mona. (Pa.) 609; *Keystone v. Norris*, 115 Pa. St. 446; *Guardian v. Hogan*, 80 Ill. 35; *Schonfield v. Turner*, 75 Tex. 324; *Basye v. Adams*, 81 Ky. 368; *Roller v. Moore*, 86 Va. 512; *Helmetag v. Miller*, 76 Ala. 183; *Michigan v. Rolfe*, 76 Mich. 146; *Singleton v. St. Louis*, 66 Mo. 63; *Mitchell v. Union*, 45 Me. 104; *Mutual v. Hoyt*, 46 Mich. 473; *Gilbert v. Moose*, *supra*; *Franklin v. Hazzard*, 41 Ind. 116; *Alabama v. Mobile*, 81 Ala. 329; *Armstrong v. Mutual Life*

Ins. Co., 11 Fed. 573; Metropolitan v. O'Brien, 92 Mich. 584; McDonald v. Birss, 99 Mich. 329; Succession of Risley, 11 Roberts (La.) 298; Batdorff v. Fehler, 8 Cent. Rep. 230; Shugar v. Gorman, 3 Cent. Rep. 558; Franklin v. Sefton, 53 Ind. 380, 388; Ruse v. Mutual, *supra*.

MITCHELL, J.

This action was brought to recover on a life insurance policy which had been paid at its maturity to the Security Bank of Minneapolis; the plaintiff claiming that he was the owner of the policy, and that the defendant had no right to pay the money to the bank. The action was tried by the court, which ordered judgment for the plaintiff for the face of the policy. All the assignments of error challenge the sufficiency of the findings of fact to support the conclusions of law. Omitting immaterial matters, and stating the findings according to their legal effect, they are substantially as follows:

On April 6, 1872, the defendant issued to the plaintiff a policy on his life for \$2,000, payable to himself in twenty years, or, in case of his death before that date, to his personal representatives or assigns. On March 16, 1881, the plaintiff assigned the policy to one Hadley. This assignment, which was indorsed on the policy, was absolute in form, but was made in fact merely as indemnity or security to Hadley for a loan of \$1,000, which he agreed shortly to procure for the plaintiff, but which he failed to do; so that the consideration for the assignment wholly failed, and hence, as between plaintiff and Hadley, the former was the owner of the policy, and the latter had no interest in it. Hadley, however, remained in possession of the policy until May 23, 1887, when he assigned and delivered it to the Security Bank of Minnesota as security for money loaned by it to him, and which he has never repaid.

When the officers of the bank took an assignment of the policy as security, they did not know "how said Hadley became possessed of said policy, or the assignment of the same from Brown to Hadley, * * * or what was the consideration for the assignment," but, "from an examination of said policy and said assignment, believed that said Hadley was the owner of said policy." They took the as-

signment from Hadley "for a valuable consideration, without any notice or knowledge of any claim on the part of said Cyrus L. Brown or his wife to said policy, and without any knowledge or notice of any rights or equities existing between said Brown or his said wife and said Hadley in any manner relating to said policy"; nor did they ever acquire any such notice or knowledge prior to the date of the payment of the policy at its maturity.

The policy, with the two assignments, remained in the possession of the bank until the policy matured, in 1892, when the defendant paid the amount due on it to the bank, after taking from it a bond of indemnity against the claims of any other persons. Plaintiff had paid the premiums on the policy up to the time he assigned it to Hadley, in March, 1881; and thereafter up to the time it matured, in 1892, the premiums (the amounts of which are found by the court) were paid by Hadley, and have never been repaid to him by plaintiff. In March, 1884, plaintiff notified the defendant not to pay any money on the policy to Hadley, or to any one else except himself, and that Hadley had no right to or interest in the policy; but there is no finding that plaintiff ever took any active measures to secure a return of the policy from Hadley. He never knew that Hadley had assigned it to the bank until after the defendant had paid it to the bank. Neither the bank nor Hadley had any insurable interest in the life of the plaintiff.

The defendant's defense is that it has paid the amount of the policy to the party entitled to it, to wit, the bank; and it bases the bank's right to the money on two legal propositions, viz.: (1) That the policy was assignable to any one, although not having any insurable interest in the life of the insured; and (2) although, as between plaintiff and Hadley, the former owned the policy, yet the plaintiff, by his conduct in clothing Hadley with all the indicia of ownership, is estopped to assert his own rights as against the bank, an innocent purchaser for value. The plaintiff takes issue with the defendant on both propositions.

In view of the conclusion at which we have arrived upon the second proposition, it becomes unnecessary to consider the first, although we remark in passing that we have not discovered anything which has changed the impression as to the state of the authorities

on the question which we expressed (obiter, it is true) in *Hogue v. Minn. P. & P. Co.*, 59 Minn. 39, 60 N. W. 812.

We do not, however, place our decision of the second proposition upon the ground advanced by counsel for the plaintiff, which is, in substance, that estoppels must be mutual and reciprocal; that only parties to the suit, and their privies, can take advantage of an estoppel existing as between themselves; and that an estoppel available only to a stranger to the action will not avail either of the parties; hence, even if an estoppel existed in favor of the bank against the plaintiff, this is not available to the defendant. This is a misapplication of a very familiar and well-settled rule of law. If the defendant had paid the amount of the policy to the party who, as between plaintiff and the bank, was entitled to it, that was a perfect defense to the action. The issue before the court was who was entitled to the money,—plaintiff or the bank; and for this purpose it was competent for the defendant to establish the right of the bank as against plaintiff, whether that right was based upon equitable estoppel or upon contract.

We, however, place our decision upon the ground that, this policy being a mere nonnegotiable chose in action, the bank occupies the exact position of its assignor, Hadley, and took it subject to the equities existing between him and his assignor, the plaintiff, unless the latter is equitably estopped by his conduct from asserting those equities against the bank, and that there are no facts in this case which create any such estoppel.

Upon the facts found, the defendant has nothing upon which to base an equitable estoppel, except the bare fact that plaintiff delivered possession of the policy to Hadley, accompanied by an absolute assignment, without any expressed conditions or limitations, and thereby clothed him with the indicia of absolute ownership. The bank officers relied upon, and based their belief in Hadley's ownership upon, their examination of the policy and the assignment, without knowing, and presumably without attempting to ascertain, how or for what purpose the assignment to Hadley was made, or what the consideration for it was. If it be said that plaintiff was negligent in not taking active measures to secure a return of the policy from Hadley, and in not personally paying the premi-

ums on his own policy, the answer is that, if so, such negligence did not constitute any breach of duty, either legal or moral, towards the bank, or any one else who might see fit to deal with the policy. The doctrine that the assignee of a nonnegotiable chose in action takes it subject to all existing equities and defenses is not confined to equities or defenses existing in favor of the debtor or obligor who executed the chose in action, but it also applies to cases where the chose in action has gone through successive assignments to the second and subsequent assignees, if there were equities subsisting between the original assignor, or any other assignor, and his immediate assignee, in favor of the former.

What is called the doctrine of "latent equities" has received some judicial support. This means that in a case like the present the equities of plaintiff, the original assignor, are latent, and cannot prevail against the title of the bank, the second assignee; that the only defenses subject to which the assignee of a nonnegotiable chose in action purchases are those existing in favor of the debtor who issued the obligation or security. This doctrine has been generally condemned as unsound, and tending to extend the peculiar qualities of negotiable paper to things in action not negotiable, and to destroy the fundamental distinction between negotiable and nonnegotiable demands. For a full discussion of this whole subject, see 1 Pomeroy, Eq. Jur. § 707, et seq.; Pomeroy, Code Rem. § 154, et seq.; also *Bush v. Lathrop*, 22 N. Y. 535.

55 N.Y. 41
The leading case in favor of the doctrine of "latent equities" is *Moore v. Metropolitan*, 55 N. Y. 41, which squarely overrules *Bush v. Lathrop*, supra; saying that it and *McNeil v. Tenth*, 46 N. Y. 325, cannot both stand, unless there shall be found to be a distinction between the acquisition of title to stocks in a corporation, and choses in action not negotiable, and then concludes that there is no distinction. But, as Mr. Pomeroy clearly points out, the court in *Moore v. Metropolitan* do not make the slightest allusion to the narrow limits placed in *McNeil v. Tenth* upon the use of the estoppel, viz. to cases in which the assignor, by a written instrument over his signature, confers, not only the apparent title, but the unconditional power of disposition over the security. But the most important distinction between the two cases lies in the fact that in the

McNeil case the subject of the assignment was not a mere nonnegotiable chose in action, but certificates of corporate stock, which are universally dealt in by business men as if they were in all respects negotiable, and are transferred from hand to hand by a blank assignment accompanied by a power of attorney giving the holder full power of disposition according to the usual course of dealing with like securities. The decision is but another instance of the manner in which business usages are adopted and incorporated into the law by the progressive course of judicial legislation.

But no such considerations exist in the case of an ordinary chose in action, like a life insurance policy, which is not only nonnegotiable in fact, but is so considered and treated by business men. And if, in the case of an ordinary nonnegotiable chose in action, the effect of an estoppel be produced against an assignor from a mere assignment, absolute on its face, executed by the owner and delivered to his assignee, it is but an easy step, as Mr. Pomeroy suggests, to extend the doctrine of equitable estoppel to the debtor or obligor himself, because he has issued an undertaking which creates an apparent liability against himself.

Our conclusion is that there was no estoppel against the plaintiff in favor of the bank. But, notwithstanding this, and that the consideration for the assignment from plaintiff to Hadley failed, and even conceding that the assignment was invalid, still Hadley had a lien upon the policy for the amount paid by him for premiums. The assignment from him to the bank transferred to it all his interest in the policy, which was the amount of the premiums advanced by him. To that amount the bank was entitled to the money on the policy, and to that extent the defendant rightfully paid the money to the bank; and this constituted a defense, pro tanto, to this action. Therefore, according to the findings, the court ought to have deducted from the face of the policy the amount of the premiums paid by Hadley, with interest, and ordered judgment against the defendant only for the balance.

The cause is remanded, with directions to the court below to modify its conclusions of law and order for judgment in accordance with this opinion.

START, C. J. (dissenting).

I dissent. The statute makes all choses in action which were not negotiable by the law merchant so far negotiable that the legal title thereto may be transferred by an assignment thereof, subject to any defense thereto, legal or equitable, that the maker may have. Therefore there is, in legal effect, written upon all nonnegotiable paper, these words: "This instrument is assignable, subject to any defense which the maker may have to it." Now, to conclude, from the fact that the maker of such an instrument is not estopped, because he has issued an undertaking creating an apparent liability against himself, that the payee, who has clothed his assignee with the apparent absolute title thereto, is not equitably estopped from asserting any latent equities as to such title against a bona fide purchaser, is to reason from false premises, because in the former case the proposed purchaser is admonished by the law that, if he buys, he does so subject to any equities the maker may have, but in the latter he is advised that the payee may transfer the absolute legal title by an assignment.

Equally unsound, it seems to me, is the claim that to apply the doctrine of equitable estoppel, as between the payee of a nonnegotiable instrument and a bona fide purchaser who parted with his money in reliance upon an absolute assignment of the paper, makes the paper, in effect, negotiable. The application of the doctrine in such a case does not affect the negotiability of the instrument, or give to it any rights other than such as the statute gives, for it is still subject to all defenses valid as to the original parties. In this case the plaintiff conferred upon his assignee the apparent absolute legal title to, and ownership of, the insurance policy, and permitted him to retain it and pay the premiums for 10 years, and then, after the bank had honestly parted with its money in reliance upon such apparent ownership, he seeks to assert a latent equity existing between him and his assignee as to the title. Upon the plainest principles of justice he ought to be estopped from asserting his equities to the prejudice of the purchaser, and such seems to be the law. *Moore v. Metropolitan*, 55 N. Y. 41; *Bigelow, Estop.* 562; *Colebrooke, Coll. Sec.* §§ 436, 439; *Jones, Pledges*, § 466.

COLLINS, J. (dissenting).

I agree with Chief Justice START in his dissenting opinion.

The appellant having petitioned for a reargument, the court granted the petition in the following order, filed on April 10, 1899.

PER CURIAM.

In view of the facts that the question involved is an important one, that the precise ground upon which the decision was based was not argued by counsel, and was decided by a divided court:

It is ordered that a reargument be, and hereby is, granted of the single question whether the Security Bank of Minnesota took the policy in suit subject to the equities of the plaintiff. Ordered, further, that the case shall be submitted on briefs, to be filed on or before June 15, next.

Hale & Montgomery, for appellant.

The policy was a nonnegotiable instrument, and was assignable like any other chose in action. See *Hogue v. Minn. P. & P. Co.*, 59 Minn. 39. The bank had a right to assume that the policy was lawfully transferred to Hadley for a valuable consideration, that Brown spoke the truth by his assignment, and that Hadley had a right to transfer it as collateral security for a loan. The rights of the bank do not depend on the actual title which Hadley had as between himself and Brown, but on the act of Brown himself, which precludes him from disputing the title which he had apparently conferred on Hadley. This principle is not in conflict with G. S. 1894, § 5157. The rule grows out of the principle that where one of two innocent persons must suffer from the act of another, it must be the one who has permitted the act to be done. *Cochran v. Stewart*, 21 Minn. 434. *Bush v. Lathrop*, 22 N. Y. 535, is no longer authority on the precise question therein involved. In *McNeil v. Tenth*, 46 N. Y. 325, and *Moore v. Metropolitan*, 55 N. Y. 41, the rule adopted by the majority opinion in the case at bar, as laid down in *Bush v. Lathrop*, was changed and modified, and it was held that where the owner of property confers on another an apparent title to or power of disposition over it, he is estopped from asserting his title as against an innocent third party who has dealt with the apparent owner in reference thereto without knowledge of the claims of the true

owner; and that the rights of such third party do not depend on the actual title or authority of the one with whom he dealt, but on the act of the owner, which precludes him from disputing the title or authority he has apparently conferred. See also *Greene v. Warnick*, 64 N. Y. 220; *Moffett v. Parker*, 71 Minn. 139; *Davis v. Bechstein*, 69 N. Y. 440; *Weyh v. Boylan*, 85 N. Y. 394; *Fairbanks v. Sargent*, 104 N. Y. 108, 116; *Colebrooke*, Coll. Sec. §§ 436-438; *Jones*, Pledges, § 466; *Bigelow*, Estop. 560, 561. The fallacy of the decision in the case at bar lies in attempting to discriminate between the different kinds of nonnegotiable choses in action, and to confine the rule which protects bona fide purchasers to those nonnegotiable instruments which are more generally sold and transferred in open market. *Rapps v. Gottlieb*, 142 N. Y. 164; *Cowdrey v. Vandenburg*, 101 U. S. 572; *International v. German*, 71 Mo. 183; *Woodruff v. Morristown*, 34 N. J. Eq. 174; *Plummer v. Peoples*, 65 Iowa, 405; *Wood's Appeal*, 92 Pa. St. 379; *Brewster v. Sime*, 42 Cal. 139, 146; *Williams v. Fletcher*, 129 Ill. 356, 366; *Spooner v. Cummings*, 151 Mass. 313; *Horn v. Cole*, 51 N. H. 287; *Grocers v. Neet*, 29 N. J. Eq. 449; *Newton v. Newton*, 46 Minn. 33, 37; *MacLaren v. Cochran*, 44 Minn. 255; *Cochran v. Stewart*, 57 Minn. 499, 509.

Smith & Smith, for respondent.

The bank was bound to make diligent inquiry as to the title and value of the paper before buying it, and was bound to make this inquiry of persons and parties interested in the paper. *Cochran v. Stewart*, 21 Minn. 435, 441; 2 *Pomeroy*, Eq. Jur. §§ 810, 813; *Olds v. Cummings*, 31 Ill. 188; *Norton v. Rose*, 2 Wash. (Va.) 233; *Murray v. Lylburn*, 2 Johns. Ch. 441; *Mickles v. Townsend*, 18 N. Y. 575; *Walker v. Dement*, 42 Ill. 272, 277; *Robinson v. Jefferson*, 1 Del. Ch. 244; *Lane v. Smith*, 103 Pa. St. 415, 420; *Trustees v. Wheeler*, 61 N. Y. 88. The burden of proof is on the purchaser of nonnegotiable paper to prove good faith and diligence. *Devoe v. Brandt*, 53 N. Y. 462; *McLeod v. First*, 42 Miss. 99; *Lynch v. Beecher*, 38 Conn. 490; *Porter v. Parks*, 49 N. Y. 564; *Newton v. Newton*, 46 Minn. 33, 38. The party asking the benefit of estoppel must have acted in good faith and with reasonable diligence, otherwise no equity will arise in his favor. *Thorne v. Mosher*, 20 N. J. Eq. 257; *Royce v. Watrous*.

73 N. Y. 597; Wilcox v. Howell, 44 N. Y. 398; Moore v. Bowman, 47 N. H. 494; 1 Story, Cont. § 475; 2 Pomeroy, Eq. Jur. § 810. Defendant knew that he who purchases nonnegotiable paper takes it subject to the rights of parties to the paper. Walker v. Dement, supra; Kleeman v. Frisbie, 63 Ill. 482. To give the conduct or admission of a party the character of an estoppel, it must have been fraudulent in its purpose, or so unjust in its results as to make out against him a clear case of culpable negligence in not having contemplated it as a natural consequence. Sutton v. Wood, 27 Minn. 362; Combs v. Cooper, 5 Minn. 200 (254); Whitacre v. Culver, 6 Minn. 203 (297).

Defendant is estopped from urging an estoppel in favor of the bank. Defendant cannot assert an estoppel in pais for some one else; to be available, it must be shown to have been made to affect the person who asserts the estoppel. Sutton v. Wood, supra; Reynolds v. Lounsbury, 6 Hill, 534; Dezell v. Odell, 3 Hill, 215; Pennell v. Hinman, 7 Barb. 644; Zabriskie v. Smith, 13 N. Y. 322, 338. The notice to defendant before it paid the money to the bank notified defendant to pay the money at its peril. Arnold v. Hoschildt, 69 Minn. 101. Brown's equities were prior and superior.

There is no ground for raising an estoppel against Brown to assert the truth. If the element of fraud is wanting, there is no estoppel. 2 Story, Eq. Jur. § 1543; Combs v. Cooper, supra; Califf v. Hillhouse, 3 Minn. 217 (311); Pence v. Arbuckle, 22 Minn. 417; 1 Herman, Estop. § 20; Davidson v. Young, 38 Ill. 145; Chandler v. White, 84 Ill. 435; Maguire v. Selden, 103 N. Y. 642; Empire v. Moers, 27 App. Div. (N. Y.) 464; Martin v. Zellerbach, 38 Cal. 300; Moffett v. Parker, 71 Minn. 139. The bank is amply protected by its other securities, hence on this ground the equity is in favor of Brown. 3 Pomeroy, Eq. Jur. § 1414. The bank took subject to every right of Brown. McDonald v. Kneeland, 5 Minn. 283 (352); Moffett v. Parker, supra; Johnson v. Carpenter, 7 Minn. 120 (176); LaDue v. First Nat. Bank, 31 Minn. 33; Tuttle v. Wilson, 33 Minn. 422; Way v. Colyer, 54 Minn. 14; Klatt v. Dummert, 70 Minn. 467; Seebold v. Tatlie, 78 N. W. 967; Thompson v. Allen, 12 Ind. 539; Haskell v. Brown, 65 Ill. 29; Bjork v. Bean, 56 Minn. 244. An assignee of a nonnegotiable chose in action takes it subject to all defenses to which it was

subject in the hands of the original holder or assignor. 1 Pomeroy, Eq. Jur. §§ 700-715; 1 Beach, Eq. Jur. § 342; 1 Daniel, Neg. Inst. § 742; Bispham, Eq. (4th Ed.) § 170; 1 Parsons, Cont. (8th Ed.) 227; Willard, Eq. Jur. (Potter's Ed.) 462; Snell, Eq. 92; 2 Spencer, Eq. Jur. 862, 863; Tiedeman, Eq. Jur. §§ 60-64; 2 Wharton, Cont. § 842, et seq.; 2 White & T. L. C. Eq. (pt. 2) 880-893; 2 Randolph, Com. Paper, § 657; 2 Story, Eq. Jur. § 1188; 1 Pomeroy, Eq. Jur. § 710; 2 Herman, Estop. § 1188; Wade, Notice (2d Ed.) §§ 79, 431-436; Benjamin, Sales (4th Am. Ed.) § 433; Olds v. Cummings, supra; Westfall v. Jones, 23 Barb. 9; 2 Am. & Eng. Enc. 1079; Clute v. Robison, 2 Johns. 594, 602; 2 Chitty, Cont. 1366; Willis v. Twambly, 13 Mass. 204; Smith v. Carder, 33 Ark. 709; Longan v. Carpenter, 1 Colo. 205; Murray v. Lylburn, supra; Norton v. Rose, supra; Robinson v. Jefferson, supra; Guerry v. Perryman, 6 Ga. 119; Jack v. Davis, 29 Ga. 219; Gray v. Thomas, 18 La. An. 412; Marvin v. Inglis, 39 How. Pr. 329; Cutts v. Guild, 57 N. Y. 229; Ingraham v. Disborough, 47 N. Y. 421; Schafer v. Reilly, 50 N. Y. 61; Littlefield v. Albany, 97 N. Y. 581; Walker v. Dement, supra.

There is nothing in the character of the assignment from Brown to Hadley to change the result. The legal effect of any kind of assignment, without limitation, is to transfer the title, and carries an implied warranty of title in the assignor and that the instrument is genuine and unpaid. Ledwick v. McKim, 53 N. Y. 307; Murray v. Judah, 6 Cow. 484; Thrall v. Newell, 19 Vt. 202; Ross v. Terry, 63 N. Y. 613; 15 Am. & Eng. Enc. 853; 6 Id. 656; Tiedeman, Bills & N. § 74. The attempted distinction cannot avail defendant under G. S. 1894, § 5157. La Due v. First Nat. Bank, supra; Way v. Colyer, supra; Tuttle v. Wilson, supra; State v. City of Lake City, 25 Minn. 404; 2 Chitty, Cont. 1369. See Warner v. Whittaker, 6 Mich. 132; Matteson v. Morris, 40 Mich. 52; Bobb v. Taylor, 56 Mo. 311; Chouteau v. Allen, 70 Mo. 290; Wells v. Clarkson, 2 Mont. 230; Sanborn v. Little, 3 N. H. 539; Williamson v. New Jersey, 29 N. J. Eq. 311; King v. Lindsay, 3 Ired. Eq. 77; Rayburn v. Hurd, 20 Ore. 229; Burkett v. Moses, 11 Rich. L. (So. C.) 432; Walker v. Sargeant, 14 Vt. 247; Hamilton v. Glenn, 85 Va. 901. If an equitable estoppel was available to the bank in the case at bar, it would have been available in all the cases above cited. The statute conferring special

privileges on notes and bills of exchange is to be limited strictly to that class of instruments. 23 Am. & Eng. Enc. 357, 399; *Cutts v. Guild*, 57 N. Y. 229; *Keech v. Baltimore*, 17 Md. 32; *Sutherland*, St. Const. §§ 400-408.

The following opinion was filed on July 11, 1899:

PER CURIAM.

After receiving and considering the additional arguments of counsel, Justices MITCHELL and BUCK adhere to the views expressed and the result reached in the opinion of the court heretofore filed, while Chief Justice START and Justice COLLINS adhere to the views expressed in their dissent, and are in favor of reversal, on the grounds therein stated. Justice CANTY, while still adhering fully to the position taken in the original opinion of the court upon the so-called doctrine of latent equities, is of opinion that the plaintiff, by reason of his conduct in allowing the policy, accompanied by an assignment absolute in form, to remain for 11 years in the possession of Hadley without taking any active measures to recover it, and in neglecting during all that time to pay the premiums necessary to keep it alive, is estopped by his laches and abandonment from now asserting any rights to or under the policy, or attempting to avail himself of its benefits which have been preserved by the expenditures of another. While Chief Justice START and Justice COLLINS are in favor of a reversal on the broader ground already stated, they also concur in the view of Justice CANTY, that the case should be reversed on the ground that plaintiff is equitably estopped by his laches and abandonment from claiming the proceeds of the policy. The court is unanimously of opinion that the policy, being valid in its inception, was assignable to any one.

It follows that the opinion of the court, either unanimously or by a majority, is that:

1. The policy was assignable by plaintiff to Hadley, and by Hadley to the Security Bank.
2. The assignment from Hadley to the Security Bank would be subject to the equities of the plaintiff, in the absence of facts creating an equitable estoppel against him; and the mere fact that the

assignment from plaintiff to Hadley was absolute in form would not create such an estoppel.

3. But the laches of plaintiff, and his practical abandonment of the policy by neglecting for 11 years to take active measures to recover possession of it, or to keep it alive by paying the premiums on it, but allowing it to lapse unless Hadley saw fit to pay the premiums at his own expense, would estop him from now claiming any rights under or benefits from the policy, as against Hadley or the bank.

If the findings of the trial court on the latter point were clear and positive there would be nothing to do but to order judgment for the defendant. But it is not clear from the findings, especially in view of the latter part of the so-called fifteenth finding, how far they were intended to go, or what was the precise ground upon which the court ordered judgment for the plaintiff. Therefore, under the circumstances, we are of opinion that the proper disposition of the appeal is to reverse, and order a new trial of the cause in accordance with this opinion. It is so ordered.

CONNECTICUT MUTUAL LIFE INSURANCE COMPANY v. CORNELIA
JACOBSON and Others.

January 30, 1899.

Nos. 11,473—(259).

Tax Judgment—Defective Description.

A tax judgment *held* void because of the insufficient description of the property.

Action in the district court for Hennepin county to recover possession of land. Defendant Cornelia Jacobson answered, claiming title under one John Kelly. The court, Lancaster, J., directed a verdict in favor of plaintiff, and from an order denying a motion for a new trial, said defendant appealed. Reversed.

Albert H. Hall and *C. J. Cahaley*, for appellant.

Charles J. Tryon, for respondent.

MITCHELL, J.

This is an action to recover possession of

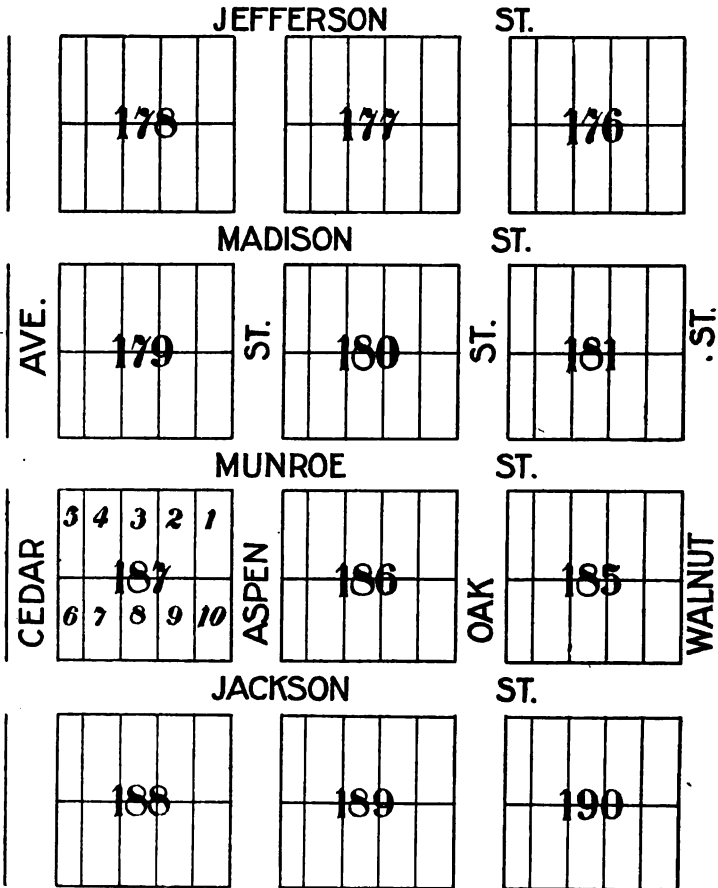
“The south thirty-one feet of the north one-half of lots six and seven in block one hundred and eighty seven of the town of Minneapolis, according to the plat of said town,” etc.

The plaintiff deraigned its title from two sources, viz., a sale under a mortgage executed by one Kelly, then the owner of the property, and, second, a sale under a tax judgment. Inasmuch as the court directed a verdict for the plaintiff on the tax title without going into the merits of the alleged title under the mortgage, it only becomes necessary to consider the former; and, under the view we have taken of the case, it is only necessary to consider the sufficiency of the description of the property contained in the tax judgment. That description is as follows:

“Front 31 ft. of rear 82½ feet, lots 6 and 7, block 187, in the town of Minneapolis.”

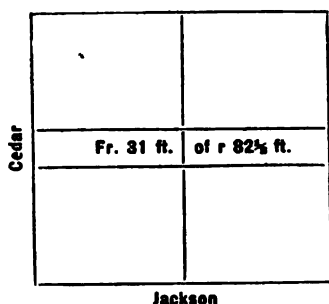
PLAT

SHOWING PART OF PLAT OF
TOWN OF MINNEAPOLIS.



ALL LOTS 66 FEET FRONT BY 165 FEET DEEP

The foregoing copy of a part of the recorded plat of the town shows that lots 6 and 7 are contiguous, lot 6 being the corner lot, and lot 7 lying immediately east of it, each of them having a front of 66 feet, or together of 132 feet, on Jackson street, which bounds them on the south, and each of them having a depth of 165 feet running back north from Jackson street; also, that lot 6 is bounded on the west and for its whole length by Cedar avenue. The premises in controversy are indicated by the following diagram, being 31 feet

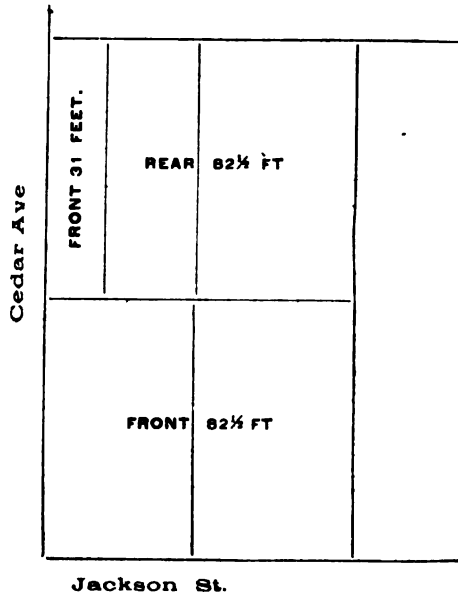


wide on Cedar avenue, and running back easterly 132 feet across lots 6 and 7. The only street frontage of the premises in dispute is, as will be observed, on Cedar avenue. It was stipulated on the trial that

"Since 1890 there has stood upon the premises in question a store building fronting and facing upon Cedar avenue, and extending back across said lots 6 and 7 in block 187, and all that part of said lots lying south of said building, to-wit, the southerly $82\frac{1}{2}$ feet of said lots 6 and 7, have now, and during said time have had, standing and built on them store buildings, all fronting on Cedar avenue, and extending across said lots a distance of 84 feet. The part of said lot 7 lying south of the first-named building and east of the line 84 feet from Cedar avenue is held in a separate tract."

The substance of plaintiff's contention is that the plat shows that these two lots front on Jackson street; that the terms "front" and "rear" are correlative, the one meaning the opposite of the other; that all parts of the description of the premises must be construed with reference to the fact that the lots front on Jackson street, and hence that the description "front 31 ft. of rear $82\frac{1}{2}$ feet"

must be construed as meaning the 31 feet of the rear $82\frac{1}{2}$ feet nearest Jackson street. On the other hand, defendant's contention is that while the description segregating the rear $82\frac{1}{2}$ feet from the balance of the lots must have recognized the fact that the two lots as a whole fronted on Jackson street, which they in fact did, yet the reference to that frontage expended itself in describing the $82\frac{1}{2}$ feet, and that the term "front," as applied to the 31 feet, must refer to Cedar avenue, the only street upon which the $82\frac{1}{2}$ feet fronted or faced, and therefore the description of the premises in the tax judgment must be referred to 31 feet across the $82\frac{1}{2}$ feet, and fronting on Cedar avenue, as indicated on this diagram.



Without stopping to analyze very closely the line of reasoning by which counsel endeavored to support their respective contentions, we suggest that people usually understand the words "front" and "frontage" as referring to street frontage, or facing according to the manner in which property is improved and used. Had any one gone upon the ground, he would have found that the property, as improved and used, faced on Cedar avenue. The description

might, and probably would, be sufficient in a deed, at least for the purposes of reforming it, when surrounding facts and circumstances can be taken into consideration for the purpose of ascertaining the intention of the parties; but we think it is altogether too ambiguous and uncertain to be effective in proceedings in invitum, which may result in depriving a person of his property, and where, in the nature of things, there is no such thing as an intention of parties. For this reason the tax judgment was void.

Order reversed, and new trial granted.

SUSANNAH THELEN v. BERNARD THELEN.

January 30, 1899.

75	483
781	289

Nos. 11,479—(246).

Divorce — Residence of Complainant Jurisdictional — Pleading — G. S. 1894, § 4792.

G. S. 1894, § 4792, provides that "no divorce shall be granted, unless the complainant has resided in this state one year immediately preceding the time of exhibiting the complaint, except for adultery committed while the complainant was a resident of the state." *Held*, that this fact of the plaintiff's residence is jurisdictional, and must be alleged in the complaint.

Findings of Court—Decision not Warranted by Facts Found.

Also that, in this case, the allegation of plaintiff's residence was put in issue by the answer, and found untrue by the court; and therefore the findings of fact did not justify a conclusion of law that plaintiff was entitled to divorce.

Divorce in Foreign State—Jurisdiction.

A divorce granted in a state in which neither party is domiciled or resident is void for want of jurisdiction of the subject-matter. *State v. Armington*, 25 Minn. 29, followed.

Same—Collateral Attack for Lack of Jurisdiction.

Where such a decree of divorce comes collaterally in question, in an action in another state, it may be impeached on the ground of want of jurisdiction of the court granting it, although the record recites or finds the jurisdictional fact of residence.

Action in the district court for Ramsey county for divorce. The case was tried before O. B. Lewis, J., who found that plaintiff was entitled to a judgment of divorce and for the sum of \$5,000 alimony. From an order denying a motion for a new trial, defendant appealed. New trial granted as to one issue.

J. N. Castle, for appellant.

C. D. & Thos. D. O'Brien, for respondent.

MITCHELL, J.

This was an action for divorce on the ground of cruel and inhuman treatment, the complaint alleging that "ever since and before the 6th day of May, 1872, she [the plaintiff] has been a citizen and resident of the state of Minnesota, and for some time last past she has been, and is now, a resident of the county of Ramsey, in said state." The defendant in his answer denied each and every allegation in the complaint "not hereinafter admitted, qualified or denied." The allegation of the complaint as to plaintiff's residence was not one of the things "hereinafter admitted, qualified or denied" in the answer. The answer further denied the alleged acts of cruel and inhuman treatment, and set up a decree of divorce of the defendant from the plaintiff rendered by a court of North Dakota in the spring of 1894, while the defendant was a resident of, and domiciled in, the city of Fargo, in that state. In her reply the plaintiff denied that the defendant had ever been domiciled in, or a resident of, the state of North Dakota, but alleged that during all the time both he and she had been residents of the state of Minnesota, and that the court of North Dakota never had any jurisdiction of the subject-matter of a divorce between the parties.

The trial court found that the allegations of the complaint as to the marriage and ages and children of the parties, and as to the cruel and inhuman treatment of the plaintiff by the defendant, were true; also that the defendant had been a citizen and resident of this state from May 6, 1872 (the date of the marriage of the parties), up to the present time, and was still a resident of the state. The court then added: "Save as aforesaid, the court finds the allegations of the pleadings to be untrue." Upon the trial the defendant introduced in evidence the judgment roll in the divorce

suit in North Dakota, from which it appeared that there had been no personal service of the summons upon the plaintiff, and that she had never appeared in that action. As a conclusion of law, the court held that the plaintiff was entitled to a decree of divorce from the bonds of matrimony.

1. Two of the assignments of error are that the court erred (1) in finding that the defendant had been a continuous resident of this state since May, 1872; and (2) in not giving full faith and effect to the decree of divorce rendered in North Dakota.

The evidence abundantly justified the court in finding that the defendant was always a resident of, and domiciled in, this state since May, 1872, and hence never acquired either residence or domicile in the state of North Dakota. It is also clear from the evidence that he never had any bona fide intention of removing to North Dakota; that he never acquired a residence there, but merely went there temporarily, for the express and sole purpose of obtaining a divorce. The evidence is conclusive that the plaintiff was not a resident of North Dakota. It is the settled doctrine of this court that, upon these facts, the courts in North Dakota had no jurisdiction to dissolve the marriage relation between these parties, and that the pretended judgment of divorce is an absolute nullity. *State v. Armington*, 25 Minn. 29. The fact that the record in the North Dakota divorce suit contains a recital or finding that the defendant was a resident of that state did not preclude the plaintiff in this action, in this state, where that divorce comes collaterally in question, from showing that the defendant never was in fact a resident of that state. This is in accord with the general rule, which allows the impeachment of a judgment of a sister state on the ground of the want of jurisdiction, even in contradiction of the record. 2 Black, Judg. § 930; 2 Freeman, Judg. § 580. This is all that need be said on this point.

2. G. S. 1894, § 4792, provides that

"No divorce shall be granted, unless the complainant has resided in this state one year immediately preceding the time of exhibiting the complaint, except for adultery committed while the complainant was a resident of this state."

The fact of the complainant's residence is jurisdictional, and must be alleged in the complaint. 2 Bishop, Mar. & Div. § 593; 7 Enc. Pl. & Pr. 67, 68; 5 Am. & Eng. Enc. (1st Ed.) 774, 775, and cases cited.

In this case the allegations of the complaint as to plaintiff's residence were put in issue by the general denial in the answer, and found untrue by the general finding that, "save as aforesaid, the court finds the allegations of the pleadings to be untrue." Upon this finding the court ought to have ordered judgment for the defendant, not on the merits, but of dismissal. After reading the record, we have no doubt that this general finding was an inadvertence on the part of the court, resulting from the fact that the question of plaintiff's residence does not appear to have been litigated on the trial. It merely crops out in the testimony of some of the witnesses, while being examined on other subjects, that, after being compelled to leave her home on account of the cruelty of her husband, the plaintiff went for a time to live with her daughter in Milwaukee. It is suggested by counsel for the plaintiff that no such question was raised in the court below, and therefore the defendant ought not to be allowed to raise it on appeal in this court. But it is presented by the record, and the findings as they stood will not support the judgment ordered.

It is therefore adjudged that the order denying a new trial be affirmed, except as respects the issue of plaintiff's residence, and as to that issue alone a new trial be, and hereby is, granted; and that the court below is directed to order either judgment on the merits in favor of the plaintiff, or a judgment of dismissal in favor of the defendant, according as he may find on the issue of residence. It is further ordered that neither party shall be entitled to statutory costs on this appeal.

EDWARD KNOTT and Others v. L. MONTGOMERY and Another.

February 1, 1890.

Nos. 11,315—(71).

Evidence—Letters Admissible—Modification of Contract of Sale.

Held, that certain letters offered in evidence by the plaintiffs, and excluded by the court, were admissible to show that the plaintiffs' claim as to the terms of the parol contract between the parties was more reasonable than the terms thereof claimed by the defendants.

Action in the district court for Lyon county to recover upon three promissory notes given by defendants to plaintiffs. The answer alleged that the notes were given in consideration of the sale of a stallion, and contained a counterclaim for damages sustained by reason of plaintiffs' alleged agreement to take back the stallion and return the notes in case he was not satisfactory. The case was tried before Webber, J., and a jury, which rendered a verdict in favor of defendants for \$75. From an order denying a motion for a new trial, plaintiffs appealed. *Reversed*.

M. E. Mathews, for appellants.

Seward & Burchard, for respondents.

BUCK, J.

From the pleadings and evidence it appears that on March 28, 1891, these plaintiffs sold to the defendants a breeding stallion for the agreed price of \$1,400, on a warranty in writing set forth in the defendants' answer. As evidence of the consideration, the defendants gave to the plaintiffs four notes, three of which are sued upon in this action, and the other was for the sum of \$300 and interest, due October 1, 1892. The stallion was not satisfactory to the defendants, and on December 27, 1892, the parties entered into a new parol agreement, whereby it was agreed that the defendants should have one-half of the \$300 note due October 1, 1892, and one year's interest on the other three notes, and the plaintiffs agreed to pay or deduct one-half of said \$300 note, and also pay or deduct one year's interest on the other three notes, described in the complaint. The parties made all deductions as agreed upon, and the

\$300 note due October 1, 1892, was canceled and mailed to the defendants.

The defendants claim that, as part of the said agreement made on December 27, 1892, the plaintiffs agreed to allow the defendants to use and retain said stallion for breeding purposes during the breeding season of the year 1893, and, in case he was not satisfactory to the defendants during said season for such purpose, then in that case the plaintiffs would take back said stallion, and cancel and return to the defendants the three notes described in the complaint. This the plaintiffs deny, and claim that by the said agreement they were released from the warranty, and from their obligation to take back the horse, and that their duty and obligation ended when they paid or deducted one-half of one note and one year's interest on the other three. It is conceded by each party that this was the only question of fact for the jury to try and determine, and upon this question the jury found in favor of the defendants.

The errors complained of by the appellants are that certain letters written by the defendants, and offered in evidence by the plaintiffs, were rejected by the court, and that, if these letters had been admitted, their contents would have tended to show that plaintiffs' contention as to the terms of the contract was more reasonable than that of the defendants. The defendants were sworn, and testified in their own behalf, and supported the claim made by them in their answer. The defendants, in their answer, admit that they purchased the horse as a sure foal getter, and that, after using him during the season of 1892 for that purpose, they knew that he did not prove to be such; and with this knowledge they allege that, after the first note of \$300, maturing October 1, 1892, had become due, they, on December 27, compromised and settled all claims growing out of said sale and warranty, and entered into a new contract, as above described by them, and with this knowledge they, as part of said agreement, did retain said horse for said use during the breeding season of 1893; but that he did not during said season prove to be a good and satisfactory foal getter, of which fact they notified the plaintiffs after the breeding season of 1893, and that the horse was worthless for breeding purposes, and requested

plaintiffs to take him back, and surrender the three notes. The horse died October 3, 1894, but his death, either as to time or cause, is not material as to the rights of the parties hereto, as the rights and obligations of the parties had become fixed before that time.

There cannot be any doubt but that the question of whether defendants had a right to return the horse because he was not a sure foal getter, during the season of 1893, was one of the principal questions involved in the litigation between the parties under the new contract, as well as the question of payment of or return of the notes. The defendants, for the purpose of showing the reasonableness of their claim in the new contract, offered evidence tending to show that, during the breeding season of 1893, the horse was not a reasonably sure foal getter, which was objected to by plaintiffs. This evidence covered a period commencing in the spring of 1891, a short time subsequent to the sale of the horse, to some time in 1894; and yet the court excluded a certain letter dated November 15, 1892, written by the defendants to the plaintiffs, where they stated that they were pleased with the horse, although he did not prove to be a sure foal getter, as warranted. They also stated that the horse's leg was worse, but that they would pay plaintiffs as soon as they could collect the money for the services of the horse. December 5, 1892, defendants wrote a letter (Exhibit 18) to plaintiffs, saying that, if the latter would make a reasonable deduction for the sore on the horse's leg, they would settle. No complaint was made in this letter that the horse was not a sure foal getter, although it was a year and a half after the breeding season of 1891, when they first used the horse for breeding purposes. Their only complaint related to the sore leg of the horse.

Plaintiffs offered in evidence Exhibit 4, dated January 17, 1894, to show that this was the first time defendants had claimed a different understanding regarding the terms of the second contract, and this only an intimation to that effect. Plaintiffs then offered in evidence Exhibit 5, to show that the defendants never made the second contract they claim to have made December 27, 1892, and to show that their present contention is inconsistent with the testimony given in court, and not consistent with the contract claimed by the defendants. This letter was written in answer to Exhibit

22, wherein Mr. Knott asks Mr. Reid what is meant by Montgomery writing that no money would be paid on the horse, and states that he is getting the bank to carry the note to help the defendants; that it makes no difference to him what the horse has done, and that he has settled with them so far as the horse is concerned. Mr. Reid was called upon, by Exhibit 22, to answer those questions and suggestions, and, by Exhibit 5, he shows that the horse has not done well, and that times are very close, and people are so mad and disgusted with the horse that if you ask them for money they fly at you as though they were going to eat you; that he went out one day to collect money for the defendants, drove all day, and got two notes of \$10 each. Then he says:

"I do not know what Montgomery said in his letter, but if it was saucy you can see he has reason to be cranky. He goes for me wild, and says if he had had his way he would have exchanged horses last year. * * * So, with a big note due on one side, and people mad on the other, it is pretty hard to know what to say, as I cannot raise the money myself, for I had my house burned about two months ago, with almost everything in it. * * * I think, if I could see you for a few minutes, I could fix things to suit both parties."

It is to be noted that in his letter there is no offer to return the horse, or any claim that defendants had a right to return him under the new contract, or that they refused to pay the notes.

These exhibits were all excluded by the court, and we think this was error. As the court had admitted defendants' evidence, covering a period during all the time stated in these letters, and many prior months, that the horse was not a sure foal getter, for the purpose of showing that defendants' claim was more reasonable as to the terms of the new contract than that of the plaintiffs, the latter were entitled to meet it by evidence to the contrary, and the contents of those letters we think tended to do so, and they were admissible in evidence, and their contents, and the weight thereof, as evidence proper to be submitted to and passed upon by the jury.

Order reversed, and a new trial granted.

FRANCIS ROGERS v. PHILIP H. GROSS and Others.

February 1, 1899.

Nos. 11,425—(108).

Insolvent Corporation—Liability of Stockholders—Amendment of Judgment upon Appeal—Motion by Nonappealing Defendants.

G. was the promoter of a gas and electric company (a corporation), became its president, and controlled its business affairs. The corporation contained a large number of stockholders, and, prior to issuing certificates of stock, they, with one exception, mutually agreed that for each certificate of stock there should be issued to each shareholder five shares of such stock, which was done accordingly, although this agreement was never acted on by the corporation. G., as president, and the secretary, issued to a large number of stockholders five shares each of this bonus or extra stock. The corporation became insolvent, and the creditors brought suit against it and the different stockholders to enforce their constitutional liability. The trial court found that G. prepared the stock subscription, and signed it for \$2,000, but held him liable for \$10,000; being a liability, also, on his five shares of the bonus stock. G. appealed to this court, where the decision of the trial court was reversed, and the liability of G. fixed at a sum not exceeding \$2,000, and the cause was remanded. Certain other stockholders then moved the trial court to reduce their liability to an amount not exceeding the original shares issued by them, instead of being held on this bonus stock. This motion was granted, and G. appeals. Ruling *held* valid.

Action in the district court for Morrison county to enforce the constitutional liability of stockholders in defendant corporation, People's Gas & Electric Company. The case was tried before Searle, J., who made and filed findings of fact and conclusions of law whereby defendant stockholders were found liable for five times the amount of their original subscriptions. Thereafter on motion of defendant stockholders, except Gross, the court made an order amending its findings and conclusions so as to reduce the liability of said stockholders to the amount of their subscriptions. From a judgment entered pursuant to said amended findings and conclusions, defendant Gross appealed. Affirmed.

George W. Stewart, for appellant.

Lindbergh, Blanchard & Lindbergh, John H. Rhodes and E. P. Adams, for respondents.

BUCK, J.

Upon this appeal there is no settled case, nor a bill of exceptions; hence its determination rests upon the question as to whether the conclusions of law are justified by the findings of fact.

There was a previous appeal to the court, which is reported in 67 Minn. 224, 69 N. W. 894, where Gross, one of these defendants, appealed from an order denying his motion for a new trial; and the case was reversed and remanded, with directions that the trial court amend its conclusions of law so that the judgment against Gross should not exceed \$2,000,—the trial court holding that plaintiff was entitled to a judgment against Gross for the sum of \$10,000. This appeal is taken by Gross, as a stockholder and as a creditor, from a judgment, not against himself, but against certain defendants, upon the grounds that the judgment so entered limits the recovery against certain other of the stockholders to one-fifth of the amount of the stock issued to them.

The action is brought to enforce the constitutional liability of the stockholders in defendant corporation. The appellant, Gross, organized the company, and subscribed \$2,000 of its capital stock, and the other defendants various smaller sums. For the purpose of bringing about an organization of the company, certain persons signed an agreement to that effect on October 28, 1892; and on the same day they actually signed the articles of incorporation, under the title of the People's Gas & Electric Company, one of the defendants herein, and immediately entered upon, and for some time carried on, the business for which it was created. Gross was the promoter, and took a leading part in organizing the company. Soon after the company was organized, the members of the company, with one exception, made an agreement that each stockholder should receive five shares for each share subscribed and paid for. This on the former appeal was held to be illegal. However, this agreement was never acted upon or accepted by the company; but, after certain debts were contracted, Gross and the secretary of the company issued certificates upon this bonus stock, although

Gross and some others never received any of this stock. Gross even contended that he was not a stockholder at all, although the trial court found him liable for \$10,000,—that is, for five times the amount of his original subscription of \$2,000,—and each other defendant liable for five times the amount subscribed, with one exception. This court on the former appeal also held the bonus stock void, and modified the judgment against Gross so as to hold him liable only for \$2,000.

When the cause was remanded, the defendant Wetzel and others (defendants who were exactly in the same position as to the bonus stock as Gross, except that such stock had been issued to them and not taken) moved the court below to modify the findings of fact and conclusions of law so as to correspond with the rule laid down by this court in the former opinion, viz., so as to reduce their liability to the amount of the original subscription. Neither plaintiff nor any of the defendants or intervenors opposed this motion, except Gross, who claims that the entire liability of the company, as shown by the judgment, is about \$7,000, and that the entire amount of the stock liability, as determined, is about \$5,000, of which he alleges not all thereof is collectible, so that there will not be assets sufficient to pay all the claims in full, hence that he (Gross) will be obliged to contribute the full amount of his stock, whereas, if the defendants to whom bonus stock was issued were charged for the full amount of this bonus stock, his liability would be materially diminished, and that, therefore, he is an aggrieved party, with the right of appeal.

Assuming that Gross has the right of appeal, we find that he was the appellant on the former appeal, and that he thereby procured a modification of the order of the trial court, when the court ordered judgment against him for \$10,000, and reduced the amount to a sum not exceeding \$2,000; and now, when the trial court, to whom the cause was remanded, places all of the defendant stockholders upon an equal basis as to other liabilities for debt incurred, he complains of a condition of affairs principally brought about by himself. The plaintiff does not appeal, notwithstanding the great reduction in the amount of the liability of each stockholder. Apparently, he thinks the finding and order in the trial court were

right, and is satisfied. The promoter and moving spirit in the original organization, in having the bonus stock issued, and in the litigation, alone seems to be dissatisfied, not because he says there is injustice in the decision appealed from, but because he is thereby compelled to pay his pro rata share of the indebtedness of the organized company, in regard to whom the trial court very pertinently says:

"That during the entire life of said company said Gross almost exclusively managed and controlled all its business and affairs, and purchased material for it without the knowledge or consent of any of the other defendants, which contracts and purchases were afterwards duly ratified by said company, and during all said time continuously, publicly, openly and notoriously held himself out to the public and to the other stockholders as the president and principal stockholder of said company."

It should be stated that Gross is not only one of the defendants, but is also a claimant against the defendant company. The finding of the trial court and its order in regard to the status of Gross is as follows:

"That defendant P. H. Gross being a judgment debtor herein, and also a claimant, the judgment against Gross herein shall be a lien upon the amount found herein to be due him from the corporation defendant, and said lien shall stand as security for the payment of the judgment against him in favor of plaintiff and the other intervenors. That said Gross shall pay his proportionate share of each assessment made under and by virtue of the judgment to be entered herein, and shall pay each execution which may be issued against him, until so much is paid that the court is fully satisfied that the dividends coming to said Gross on his said claim as a creditor will fully pay the balance due from said Gross on all further assessments or executions against him, and until that time no amount whatever shall be received by said Gross on his claim against said company; and when such sums are paid the court may order the collection of further assessments against said Gross stayed; and on distribution the dividend due him may be set off against the amount still due from him, and, if there is any balance remaining against said Gross, the same shall be paid by him, and execution shall issue therefor; and, if said Gross has overpaid, the surplus shall be returned to him."

The amount of the different claims against the defendants are specifically found by the court, and the amount of liability of each

stockholder is also distinctly and separately found and determined by such court, and the proper relief ordered.

Judgment affirmed.

CANTY, J.

I concur. I am clearly of the opinion that if the appeal had been taken by a creditor who became such without knowing the facts and who came into court with clean hands, he would prevail. As to such a creditor, the bonus stock issued to these respondents was sufficiently issued and accepted. But Gross is not such a creditor. He cannot invoke in his favor the doctrine of estoppel, and, as against him, these respondents have a right to rescind the bonus stock agreement on account of the breach of the agreement on his part; at least, such breach is a good defense as against him, notwithstanding the statute of frauds. See *McKinney v. Harvie*, 38 Minn. 18, 35 N. W. 668, and *McClure v. Bradford*, 39 Minn. 118, 38 N. W. 753, where a somewhat analogous principle is laid down.

MINNESOTA BUTTER & CHEESE COMPANY v. ST. PAUL COLD-STORAGE WAREHOUSE COMPANY.

February 1, 1899.

Nos. 11,459—(252).

75	445
52	107n

Warehouseman—Negligence in Storage of Cheese—Terms of Receipt.

The defendant, a warehouse company, received from plaintiff a large amount of cheese for storage in its warehouse for hire, and issued to plaintiff a receipt, the conditions of which were as follows: "All the property is to be at owner's risk of any loss or damage from riot, fire, water, deterioration, defective cooperage, packing, ratage, vermin, leakage, frost, or from being perishable or otherwise inherently defective when stored." The overhead brinepipes used by defendant in keeping a low temperature in its storage room were covered with ice, and the defendant negligently allowed the temperature in said room to rise so that said ice melted, and the water therefrom, through defendant's carelessness, dripped down upon, and greatly damaged, plaintiff's cheese therein stored. *Held*, that the defendant was not exempt from liability for damage caused by its own negligence.

Action in the district court for Ramsey county to recover damages caused by defendant's negligence in failing properly to keep cheese delivered to it for storage. The case was tried before Kelly, J., and a jury, which rendered a verdict in favor of plaintiff for \$1,750. From an order denying a motion for a new trial, defendant appealed. Affirmed.

Clapp & Macartney, for appellant.

A mere bailee for hire, who is not a common carrier, is under no obligation to receive goods for bailment, and may make any contract he sees fit in reference to the liability assumed. Schouler, Bailm. (3d Ed.) §§ 101, 106; Edwards, Bailm. (3d Ed.) § 333; Leonard v. Hendrickson, 18 Pa. St. 40; Reinstein v. Watts, 84 Me. 139; Story, Bailm. (9th Ed.) § 426a; Symonds v. Pain, 6 Hurl. & N. 709. Having accepted a paper with the terms of which it was familiar, plaintiff cannot say that there was another agreement than that contained therein. Brown v. Hitchcock, 28 Vt. 452. Plaintiff assumed all the risks incident to the refrigerating system. Parker v. Union, 59 Kan. 626.

Stevens, O'Brien, Cole & Albrecht, for respondent.

A contract which seeks to limit an already existing obligation will be strictly construed, and unless it in terms provides against negligence it will be unavailing for that purpose. Lawson, Bailm. § 162. A writing will not be so construed as to extend the meaning which its language expresses, because it expresses what would be the legal result if no writing were executed. Delaware v. Starrs, 69 Pa. St. 36. A contract which modifies existing rights must have a consideration to support it. Wehmann v. Minneapolis, St. P. & S. Ste. M. Ry. Co., 58 Minn. 22; Lawson, Bailm. § 156.

BUCK, J.

The plaintiff brought this action to recover of the defendant damages which it alleged it had suffered by reason of the negligent acts of the defendant in caring for a large quantity of cheese which plaintiff had consigned to the defendant to store and preserve for future sales. The cheese was delivered in wooden boxes, in good condition, and placed in defendant's warehouse, where it was to be

kept in a dry room at a temperature of about 32 degrees above zero, and kept at such low temperature by overhead pipes filled with brine. Upon the brinepipes ice and frost formed at a low temperature, but when the temperature rose in the room, as it did, this ice and frost melted, and dripped down upon the floor, and upon the cheese boxes, and thereby caused the cheese to become damp and mouldy, and greatly deteriorate in value. The question of the defendant's negligence was submitted to the jury, and it found a verdict in favor of the plaintiff. The evidence upon this question fully warrants the verdict.

The legal question involved hinges upon the construction to be placed upon a receipt issued by the defendant, and sent to the plaintiff several days after some of the cheese was stored in defendant's warehouse. The receipt acknowledged that defendant had received at different times, on July 2, 3, and 7, 139 boxes of cheese, to be delivered to plaintiff or order, on surrender of the order and payment of all charges. It further contained this provision:

"Conditions.

"All the property is to be at owner's risk of any loss or damage from riot, fire, water, deterioration, defective cooperage, packing, ratage, vermin, leakage, frost, or from being perishable or otherwise inherently defective when stored."

As the plaintiff received and kept this receipt, it was bound by its terms and conditions, but, as we construe the receipt, the defendant is not exempt from its own acts of negligence in caring for the cheese while in its warehouse and it was receiving a full consideration for caring for the same. In all bailments the nature and value of the property affects the question of ordinary care, and this degree of care is such as the generality of mankind use in their own affairs. This receipt was issued by the defendant, and it is using it for its own benefit, and if it is ambiguous it must be construed against itself; and we think that an exemption from a loss or damage through any particular cause will never be construed to cover a negligent loss of that character. Lawson, Bailm. § 162. This receipt does not in terms provide against the negligence of the defendant. The condition that all the property shall be at the owner's risk of any loss or damage from water might doubtless apply

to cases of a great flood, or a violent storm of rain, but not to dripping of water from the overhead pipes resulting from the defendant's negligence in not giving them proper attention and care. It was clearly the defendant's duty to see that such dripping did not injure the cheese left in its care for hire.

The jury found the defendant negligent in this respect, and, as this was in violation of its duty and obligation to the plaintiff, the order denying the defendant's motion for a new trial must be affirmed, as we find no reversible errors. So ordered.

STATE v. RUSSELL SAGE.

February 1, 1899.

Nos. 11,526—(271).

Collection of Real-Estate Taxes—Statute of Limitations—G. S. 1894, § 5136, subd. 2.

Under G. S. 1894, § 1578, the county treasurer is required to return to the county auditor on the first Monday in January in each year the several tax lists in the treasurer's hands, showing the delinquent taxes on each lot or tract of real estate. And under section 1579 of said statute, and on or before January 20 annually, the county auditor is required to file in the office of the clerk of the district court a verified and correct list of taxes delinquent upon real estate in his county, which filing is deemed the institution of an action. *Held*, that the six-years limitation of actions "upon a liability created by statute" does not commence to run against proceedings to enforce payment of taxes until the expiration of the time allowed for the filing of such list with the clerk of the district court.

Title to Indemnity Lands—Approval of Selection.

An act of congress approved July 4, 1866 (14 Stat. 87), entitled "An act making an additional grant of lands to the state of Minnesota, in alternate sections, to aid in the construction of railroads in said state," in part granted to the Hastings & Dakota Railway Company certain lands to the amount of five alternate sections per mile, but, in case of a deficiency, then the secretary of the interior was authorized to select sufficient public land to make up the deficiency. Such lands are usually designated "indemnity lands." *Held*, that no title to such indemnity lands was vested in the railroad company until a selection was made.

by which they were pointed out and ascertained, and the selection approved by the secretary of the interior, and until such time the lands were not taxable by the state.

Land not Assessed for Taxes—Payment of Penalties.

Taxable real estate was omitted from the assessment roll for the years 1890 and 1891, but the county auditor entered the same upon the assessment and tax books for 1896, and extended against said property the taxes which would have accrued against the same for the years 1890 and 1891. And, said taxes not having been paid, the county auditor, on January 20, 1898, filed with the clerk of the district court a list of delinquent taxes, including the real property so omitted, with the penalties accruing June 1, 1897, and January 1, 1898, on the unpaid taxes. *Held*, that these unpaid taxes were subject to said penalties.

Proceeding in the district court for Swift county to enforce the payment of taxes for the years 1890 and 1891, delinquent and unpaid on the first Monday in January, 1898, and the penalties accrued thereon, upon certain granted and indemnity lands. The matter was tried before Qvale, J., who made findings of fact, and as conclusions of law found (1) that plaintiff was entitled to judgment for the amount of taxes due and delinquent on all lands described in Exhibit A, referred to in the opinion, and to the penalties accrued thereon; and (2) that defendant was entitled to judgment for the cancellation of all taxes and penalties appearing against all the lands described in Exhibit B, referred to in the opinion. Both parties feeling aggrieved by the decision, the court certified the case, upon points which are set forth in the opinion, to the supreme court. Affirmed.

S. H. Hudson, County Attorney, for the state.

Owen Morris, for defendant.

BUCK, J.

Proceeding on the part of the state to enforce the payment of taxes for the years 1890 and 1891, delinquent and unpaid on the first Monday in January, 1898, and the penalties accrued thereon, upon certain granted and indemnity lands situated in Swift county. The cause was tried in the district court of Swift county upon stipulated facts, and certified to this court as provided by law upon points which the court deemed of great public importance, viz.:

(1) Are the lands described in Exhibit B attached to defendant's answer, being indemnity lands, taxable for the years 1890 and 1891?

(2) Is the enforcement of the taxes of 1890 in this proceeding on the granted lands described in Exhibit A attached to defendant's answer barred by the statute of limitation?

(3) Are the above taxes and those of 1891 subject to penalties accruing June 1, 1897, and 1898?

The questions involve the taxes for the years 1890 and 1891, which were omitted, or through neglect not extended against these lands in those years, and were added by the county auditor to the tax rolls of the year 1896, under and pursuant to G. S. 1894, § 1631. The lands herein involved appear to be of two distinct classes, differing in their legal status, one class appearing and described in Exhibit A, and included in the granted lands lying within the primary or granted limits of the Hastings & Dakota Railway grant, and the other class, designated in Exhibit B, including lands lying in the indemnity limit of said grant. The district court decided that the granted lands described in Exhibit A were taxable, but that the indemnity lands described in Exhibit B were not taxable. Each party being dissatisfied with the decision of the court, it certified the case to this court under G. S. 1894, § 1589, for its opinion upon these questions as above stated.

Taking up the question as to the granted lands described in Exhibit A, the question arises as to whether the enforcement of the collection of taxes upon said lands was barred by the statute of limitations. Counsel for the state concedes that the time limited by the statute for enforcing a liability for the collection of taxes is six years after the cause of action accrues (*County of Redwood v. Wisona & St. P. Land Co.*, 40 Minn. 512, 41 N. W. 465, and 42 N. W. 473), but claims that these proceedings were commenced in due time. This raises the question as to the time when the proceeding in the nature of an action could have been commenced for the enforcement of the payment of delinquent taxes for the year 1890 upon the lands described in Exhibit A, none of them having been assessed for that year.

There are several preliminary steps necessary in the proceedings to collect taxes before the time arrives when the right to commence

an action upon a liability created by statute accrues. The taxes, if duly assessed upon the lands for 1890, would have become due on the first Monday in January, 1891, at which time the county auditor is required to deliver the tax list to the county treasurer for collection, and he is required to retain the same until the first Monday in January, 1892, at which time he should return said list to the county auditor, and thereupon all unpaid taxes become delinquent. G. S. 1894, § 1578. In this case the first Monday in January, 1892, was the fourth day of that month. Subsequently there are several things to be done by the county auditor before he files his delinquent list with the clerk of the district court, as will be seen by examining G. S. 1894, § 1579, which reads as follows:

“On or before the twentieth day of January the county auditor shall file in the office of the clerk of the district court of the county, or, if it be attached for judicial purposes to some other county, then in the office of the clerk of such court in that county, a list of the delinquent taxes upon real estate within his county, which list shall contain a description of each piece or parcel of land on which such taxes shall be so delinquent, with the name of the owner, if known, and if unknown, so stated, appearing on the delinquent list, and the total amount of tax delinquent and penalty for each year opposite such description, and shall verify such list by his affidavit that the same is a correct list of taxes delinquent, for the year or years therein appearing, upon real estate in said county. The filing of such list shall have the force and effect of filing a complaint in an action by the county against each piece or parcel of land therein described, to enforce payment of the taxes and penalties therein appearing against it, and shall be deemed the institution of such action; and the same shall operate as notice of the pendency of such action.”

It is to be observed that this section does not require the auditor to file with the clerk the list returned to him by the county treasurer, but a list containing a description of each piece or parcel of land on which taxes are delinquent, and the penalty for each year set opposite such description, with the name of the owner, if known, and, if unknown, so stated, appearing on the delinquent list, which list must be verified by his affidavit that the same is correct. Thus it appears that several things are made a prerequisite to the auditor's list before its filing which are not required by section 1578 in the list furnished the auditor by the treasurer. Hence the mere

fact that a delinquency may exist on the first Monday in January does not of itself then give a right of immediate action. It would be a physical impossibility for the auditor to prepare his list, add the penalties for each year, see that the names of the owners were correct, and verify the correctness of the whole list on the day it was delivered to him by the treasurer. Especially would this be the case in some of our largest and most thickly populated counties, and hence he is given the period from the first Monday in that month to January 20 to prepare his list, which may in many respects differ materially from the one returned to him by the county treasurer. No presumption arises in this case that the county auditor could or would have filed his list before January 20, 1892. Certainly, the statute of limitations would not commence to run, at least until the list was perfected; and, as there is no proof that it was ever perfected, the cause of action cannot be deemed to have accrued, nor the statute to have commenced to run, until the very last day allowed the auditor for filing his list with the clerk of the district court, viz., January 20, 1892. In the case of *County of Chicago v. St. Paul & D. R. Co.*, 27 Minn. 109, 6 N. W. 454, it was said:

"The only mode in which the state can assert a right to tax lands, so that the claim of right may be judicially determined, is by the filing of the list. That is equivalent to the commencement of an action for the determination of such claim of right."

Until this is done, no jurisdiction is acquired to proceed against the taxpayer or his property, nor to require him to object or answer. If the list is filed by the auditor on January 20, that is the day when the right of action accrues, and when the action is commenced under the statute. In the case at bar the county auditor of the county of Swift delivered the list of the several districts of his county showing the amount of taxes due and delinquent for the years 1890 and 1891 upon the lands described in Exhibit A to the clerk of the district court of Swift county on January 20, 1898, with the delinquent list of that year, hence we answer this second question by saying that such proceedings were not barred by the statute of limitations.

Are the lands described in Exhibit B attached to defendant's

answer, being indemnity lands, taxable for the years 1890 and 1891?—this being the first question certified by the trial court.

By virtue of a stipulation between the parties, the trial court found as facts that Russell Sage, as assignee in trust of the Hastings & Dakota Railway Company, is the owner of lands particularly described in Exhibit B, made a part of defendant's answer; and that Sage, as assignee in trust, became the owner of, and vested with the title to, all the lands described in said Exhibit B in the years 1894 and 1897, and not before, he acquiring title to said lands by and through mesne conveyances from the United States under and by virtue of an act of congress approved July 4, 1866 (14 Stat. 87), entitled "An act making an additional grant of land to the state of Minnesota, in alternate sections, to aid in the construction of railroads in said state"; that the lands described in said Exhibit B are commonly known as lieu or indemnity lands; and that the county auditor of Swift county entered all of said lands described in said Exhibit B upon the assessment and tax books of said county for the omitted years of 1890 and 1891; and that said auditor assessed said lands for said years, and extended taxes against them in the tax list for the current year 1896.

It appears that the proper parties, on May 26, 1883, applied to the proper land office for these indemnity lands, and that said application was finally rejected by the secretary of the interior solely because said application did not contain a designation, tract for tract, of lands lost, in lieu of which selections were made. When this decision was made, the parties immediately, on October 29, 1891, again applied therefor, and a designation of lands lost, tract for tract, was then made. Thereafter, and on October 22, 1894, and not before, as to a part of said lands, and on March 29, 1897, as to the remainder thereof, said second application for and selection of said lands was duly approved by the secretary of the interior, and certified to the state of Minnesota, as provided by law, which certificate was filed in the office of the auditor of state on February 4, 1895, as to part of said lands, and on April 9, 1897, as to the remainder thereof, and the state of Minnesota deeded part of said lands to the defendant, Russell Sage, as assignee in trust, by an

instrument dated April 13, 1895, and the remainder are still undecided.

As a conclusion of law upon the facts, the court found that the defendant was entitled to judgment for the cancellation of all the taxes and penalties appearing against all the lands described in Exhibit B. Of course, the defendant acquiesces in this finding, but, the plaintiff contends that the title to these indemnity lands described in Exhibit B became vested in the defendant long prior to the year 1890, and that, inasmuch as the company had fully complied with the necessary requirements as to the selection of the lands, it became unnecessary for the secretary of the interior to approve such selection, and that the title to said lands vested in the company immediately upon selection, without his approval.

The vice in the contention of the plaintiff is that these indemnity lands were not selected by the secretary of the interior until 1894 and 1897, and "no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and a selection made approved by the secretary of the interior." *Sioux City & St. P. R. Co. v. Chicago, M. & St. P. Ry. Co.*, 117 U. S. 406, 6 Sup. Ct. 790. This decision was followed in *Wisconsin Cent. R. Co. v. Price Co.*, 133 U. S. 496, 10 Sup. Ct. 341, where the same rule was applied, and it is there said that the same view has been held by the different attorneys general of the United States, and that such has been the constant practice of the land department. These decisions control this phase of the case, and hence we answer the first question, viz., are the lands described in Exhibit B, being indemnity lands, taxable for the years 1890 and 1891, in the negative. We do not think that the case of *Sage v. Swenson*, 64 Minn. 517, 67 N. W. 544, cited by counsel for the state, is in point; and, if it is, the question arising as to when the title to the indemnity lands vested is a federal one, the decision of the supreme court of the United States controlling.

The third and remaining question is, are the taxes for 1890 and 1891 subject to penalties accruing January 1, 1897, and January 1, 1898?

The lands described in Exhibit A, being granted lands, or lands in place, were taxable for the years 1890 and 1891, but, as they were

omitted for these years, the county auditor added them to the tax rolls of the current year 1896, pursuant to G. S. 1894, § 1631, and they were duly and properly assessed by said auditor for said years 1890 and 1891, and by him the omitted taxes for these years were duly extended against said lands on the tax list for the current year 1896. These taxes, so duly extended against said lands, became delinquent upon the first Monday of January, 1898, and such delinquency for taxes due on said lands for 1890 and 1891 appears against said lands upon the delinquent tax list for 1898, which was duly filed with the clerk of the district court on January 20, 1898. There are no penalties included in the tax proceedings against said granted lands except those accruing January 1, 1897, and January 1, 1898, by virtue of their being placed on the regular tax list with the taxes of 1896. Of course, the defendant had the same time and opportunity to pay these taxes before they became delinquent as other taxpayers who had neglected to pay their taxes upon lands duly assessed in 1896. As such assessment was then valid, and the taxation proper and legal, it logically follows that the accrued penalties for nonpayment of taxes lawfully and properly accrued.

County of Redwood v. Winona & St. P. Land Co., 40 Minn. 512, 41 N. W. 465, and 42 N. W. 473, cited by defendant's counsel, is not in point. In that case it was held that penalties for nonpayment of taxes can only be imposed after the taxpayer has had an opportunity to pay, and fails to do so. In that case it also appeared that penalties had been included in the subsequent assessment for past years, where the property had previously been omitted for several years. This was held to be illegal. That case differs widely from this one, and is not an authority upon the point here involved, and hence we answer the third question in the affirmative so far as concerns the lands included in Exhibit A, being granted lands, and they are subject to the penalties accruing January 1, 1897, and January 1, 1898.

We therefore agree with the trial court that plaintiff is entitled to judgment for the amount of taxes due and delinquent on all the lands described in Exhibit A, being granted lands, and to the penalties accrued thereon, and that defendant is entitled to judgment for the cancellation of all taxes and penalties appearing against all

the lands described in Exhibit B, being indemnity lands; hence the order for judgment is affirmed.

STATE v. WEST DULUTH LAND COMPANY.

February 2, 1899.

Nos. 11,365—(26).

Taxes—Unfair Assessment of Real Estate not a Defense.

In proceedings under the provisions of G. S. 1894, c. 11, to enforce the collection of taxes on real property remaining unpaid and delinquent, it is no defense that the objector's property was assessed at more than twice its value in money, or what it would have sold for in money. Nor is it a defense that such property, suburban in its character, was so assessed, while central business property in the same taxing district was systematically assessed at not more than half its money value, and intervening property was assessed from half to its full true value. The taxpayer's remedy for official misconduct of this kind is to appear before the town, or city, or county board of equalization, and there attempt to correct the wrong.

City of Duluth—Park Tax—Sp. Laws 1891, c. 54, § 13.

Sp. Laws 1891, c. 54, § 13, which section authorizes the park board of the city of Duluth, an appointed body, annually to determine the amount of tax to be levied in said city for park purposes, not exceeding such sum as can be raised by a tax of one-tenth of one per cent. upon each dollar of taxable property, is not unconstitutional.

Same—Estimate of Tax Required—Provision Directory.

The provision in said section requiring the park board to certify the amount determined by it to be necessary to be levied as a tax to the county auditor on or before October 1 of each year is, in so far as the time is concerned, merely directory. The certificate here questioned was made October 14. *Held* to be a sufficient compliance with the statutory requirement.

County Bonds—Laws 1895, c. 289—Sp. Laws 1877, c. 63, § 10.

The effect of Laws 1895, c. 289,—a general law relating to the issuance of county bonds,—was to repeal, by implication, the prohibition as to any subsequent or further issue of bonds by the county of St. Louis, found in Sp. Laws 1877, c. 63, § 10. It was further legislation on the subject, and therefore removed the inhibition.

Same—Sale at Par—Commission Paid to Broker.

Under the provisions of Laws 1895, c. 289, there were issued by the county above mentioned bonds of the face value of \$140,000, and the board of county commissioners entered into a contract with a broker, in which it was stipulated that he should receive 10 per cent. of such face value as compensation in full for lithographing and printing the blank bonds, and for all services in connection with and incident to their sale, including all sums paid by him for legal advice and services. As a matter of law it cannot be held on these facts alone that the agreed compensation was a violation of section 4 of said chapter 289, which forbids a sale of bonds at less than face value.

Independent School District of Duluth—Sp. Laws 1891, c. 312—Const. art. 4, § 33.

Sp. Laws 1891, c. 312, entitled "An act for the formation and to fix the boundaries of the independent school district of the city of Duluth," etc., was not obnoxious to the provisions of section 33 of article 4 of the constitution, as it existed at the time of the enactment. It created a school district, with boundaries coincident with those of the city. The entire chapter could have properly been incorporated into the city charter as providing merely for one of the executive branches or departments of the municipality. It was legislation for a city.

Same—Title of Act.

The subject of the act was expressed in its title.

Levy of School Tax—Resolution of Board of Education—G. S. 1894, §§ 3806–3809.

As authorized in the act, the board of education passed a resolution in which a total amount was levied as a tax for school purposes for the current year; but the total amount was apportioned to three distinct funds, namely, general, building and sinking. *Held*, that it sufficiently appeared that the levy designated as "general fund" was for the maintenance of schools, and authorized by G. S. 1894, § 3809; that the levy designated as "building fund" was for the erection of school houses, or the purchase of sites, authorized by sections 3806 and 3807; and that the levy specified as a "sinking fund" was made to meet the principal and interest of the indebtedness of the district as it matured, and was authorized by section 3808.

Provisions not Mandatory.

Many regulations are made by statute and designed for the information of assessors and officers, and intended to promote method, system and uniformity in the mode of proceeding, the compliance or noncompliance

with which does not, in any respect, affect the rights of taxpaying citizens. These may be considered directory. Officers may be liable for not observing them, but their observance is not a condition precedent to the validity of the tax.

Taxes—Violation of G. S. 1894, §§ 3802, 3807, 3809, not a Defense.

That the provisions of G. S. 1894, §§ 3802, 3807 and 3809, prescribing to some extent the manner in which the county auditor shall be notified of the amount of a tax levy made by a board of education, and the method of certifying such amount, have not been strictly complied with, is, because of the language found in sections 1586, 1588, no defense in proceedings of this nature.

Proceedings in the district court for St. Louis county to enforce the collection of taxes on real estate for the year 1896, delinquent and unpaid on the first Monday of January, 1898. West Duluth Land Company filed an answer, wherein it objected to entry of judgment against lands owned by it on various grounds, and a trial was had before Moer, J., who found in favor of plaintiff. On application of the objector, the court certified to the supreme court the following points or questions:

First. (1) Whether it is any defense, either in whole or in part, to proceedings to enforce the collection of a tax, that the property in question was assessed at more than twice its full value in money, and more than twice what it would have sold for, at the time of such assessment, at a fair and voluntary sale for cash. (2) Whether it is any defense in these proceedings, either in whole or in part, that while the property in question, being suburban property, was systematically assessed at its full value in money and more, central business property in the same city was systematically assessed at not more than half its value in money, and intervening properties were assessed at various amounts between 50 and 100 per cent. of their true value in money.

Second. (1) Whether Sp. Laws 1889, c. 401, § 13, as amended by Sp. Laws 1891, c. 54, is constitutional. (2) Whether the park board of Duluth has any power to certify to the county auditor, after October 1, the amount of their annual levy for park purposes, and whether the county auditor has power to extend upon the tax list taxes so certified.

Third. (1) Whether the effect of Sp. Laws 1877, c. 63, § 10, was to deprive the county of St. Louis, and all its officers, of the power to levy any tax to pay the principal or interest of any bonds issued under the authority of that act. (2) Whether, if such was the effect, Laws 1895, c. 289, § 13, or any other general act, repealed said section 10, there being no express repeal of such section. (3) Whether, under the facts found by the court, the road bonds in question were sold at less than par.

Fourth. Whether, if the tax for the road bonds was unauthorized, the entire county levy is void, because part of the levy was for an unauthorized, and therefore an illegal, purpose.

Fifth. (1) Whether the common council of Duluth can levy the municipal taxes after October 10. (2) Whether the county auditor has power to extend upon the tax list taxes levied and certified to him by incorporated cities after October 10.

Sixth. (1) Whether Sp. Laws 1891, c. 312, is constitutional. (2) Whether if chapter 312 is unconstitutional, the corporation thereby created is now a legal corporation by virtue of G. S. 1894, § 3648. (3) Whether, if such corporation is now a legal corporation, and chapter 312 is unconstitutional, such corporation has power to levy the taxes in question. (4) Whether, if the corporation has power to levy the taxes in question, such taxes were properly levied and extended upon the tax list. This involves the questions: (a) Whether a levy for a "general fund" and a "sinking fund" is for a purpose known to, and therefore authorized by, the law. (b) Whether the letter from the clerk of the school board to the county auditor was such a certification of the tax levy as to authorize the extension of this levy upon the tax list by the county auditor. (c) Whether a tax levy for building purposes must not, under G. S. 1894, § 3807, be certified by the chairman and secretary of the school board to the county auditor; and if so, whether the county auditor had any authority in this case to extend upon the tax list so much of the tax levy as is for building purposes. Affirmed.

Billson, Congdon & Dickinson, for objector.

The overvaluation was intentional. Const. art. 9, § 1, forbids collection of a tax which is intentionally unequal. *Sanborn v.*

Commissioners, 9 Minn. 258 (273). Property must be taxed "according to its true value in money." Const. art. 10, § 3. By G. S. 1894, §§ 1514, 1536, 1557, 1558, the legislature has aimed to secure equality in taxation. When an omission has produced an unequal or unfair tax, it is pro tanto a defense. G. S. 1894, §§ 1580, 1584, 1588. An assessment made with intentional violation of the law is bad. *County of Otter Tail v. Batchelder*, 47 Minn. 512, 517; *In re Cloquet Lumber Co.*, 61 Minn. 233; 236. See *Houghton v. Austin*, 47 Cal. 646.

Sp. Laws 1889, c. 401, § 13, as amended by Sp. Laws 1891, c. 54, is unconstitutional. Section 13 empowers the park board to determine the amount of the tax. The body having power to determine the amount of the tax, and to certify it to an official who is compelled to extend it on the tax list, is the body which levies the tax. *Board v. Brown*, 12 Utah, 251; *State v. Lakeside Land Co.*, 71 Minn. 283. The power to determine the amount of a tax is legislative. *Cooley, Taxn. c. 2*; *U. S. v. New Orleans*, 98 U. S. 381, 392. Power to tax, except when authorized by the constitution, cannot be delegated to an administrative officer. *State v. Young*, 29 Minn. 474, 551; *State v. Simons*, 32 Minn. 540, 543; *Anderson v. Manchester Fire Assur. Co.*, 59 Minn. 182, 195; *State v. Sullivan*, 67 Minn. 379, 384. The power may be delegated to municipal organizations. Const. art. 11, § 5. But the power may be exercised only by the legislative department of the municipal organization. *State v. Lee*, 29 Minn. 445, 450; *Harrington v. Town of Plainview*, 27 Minn. 224, 230; *Cooley, Taxn. (2d Ed.)* 63, 65; *McCabe v. Carpenter*, 102 Cal. 469; *State v. Mayor*, 103 Iowa, 76; *People v. Common*, 28 Mich. 228; *Hinze v. People*, 92 Ill. 406, 415; *People v. Mayor*, 51 Ill. 17; *Parks v. Board of Commrs.*, 61 Fed. 436; *Board v. Abbott*, 52 Kan. 148; Const. art. 2, §§ 3, 4, 5; Id. art. 2. *State v. District Ct. of Hennepin Co.*, 33 Minn. 235, 243, is not opposed to this position. Sp. Laws 1891, c. 54, § 13, requires the tax to be certified on or before October 1. A certificate made after this date is void. *Mix v. People*, 72 Ill. 241; *First v. Cook*, 77 Ill. 622; *Finnegan v. Gronerud*, 63 Minn. 53.

Sp. Laws 1877, c. 63, § 10, deprived the county of power to levy a tax to pay principal of any bonds not issued under that act. The

language of the act leaves no room for construction. *State v. Rodman*, 58 Minn. 393, 399. Laws 1895, c. 289, did not repeal that act. Power to create a debt carries by implication power to levy a tax to pay the debt, unless that power is limited. *U. S. v. New Orleans*, supra. See *State v. Board*, 39 N. J. L. 660. When the taxing power is limited, such limitation rebuts the inference of a grant of power to levy an additional tax to meet the authorized debt. *Corbett v. City*, 31 Ore. 407; *U. S. v. County of Macon*, 99 U. S. 582, 590. The act of 1895 is general, and did not affect that of 1877. *State v. McCardy*, 62 Minn. 509, 517. A general act made applicable to any county does not repeal by implication a prior special act, on the same subject-matter, affecting one county, though it expressly repeals all acts inconsistent with it. *State v. Archibald*, 43 Minn. 328, 331. See also *Moore v. City of Minneapolis*, 43 Minn. 418; *State v. Harris*, 50 Minn. 128, 135; *State v. Egan*, 64 Minn. 331. The bonds were sold at less than par, and being issued in violation of the act, are void, unless in the hands of innocent holders. *Gould v. Town*, 23 N. Y. 456, 459; *Starin v. Town*, 23 N. Y. 439, 446; *City v. Butcher*, 3 Kan. 104.

Part of the levy being for an unauthorized purpose, the whole is void. *Cooley*, Taxn. 296; *Culbertson v. Witbeck Co.*, 127 U. S. 326, 335; *Bailey v. Haywood*, 70 Mich. 188; *Haley v. Whitney*, 53 Hun, 119, 122; *Hewitt v. White*, 78 Mich. 117; *Drake v. Ogden*, 128 Ill. 603. Thus a tax levy which exceeds the statutory limit is void. *City v. Raley* (Tex. Civ. App.) 32 S. W. 183; *Hubbard v. Brainard*, 35 Conn. 563, 568; *Libby v. Burnham*, 15 Mass. 144; *Blackwell*, Tax Tit. (4th Ed.) 179. And the collection of the whole will be enjoined. *Worthen v. Badgett*, 32 Ark. 496; *Porter v. Rockford*, 76 Ill. 561, 564. In Minnesota the statute makes the levy good up to the limit.

The council may not levy the taxes after October 10. G. S. 1894, § 1557; *Wells v. Commissioners*, 77 Md. 125; *McLaughlin v. Thompson*, 55 Ill. 249; *Free v. Scarborough*, 70 Tex. 672; *Standard v. Independent*, 73 Iowa, 304; *Brown v. Hogle*, 30 Ill. 119; *Parker v. Overman*, 18 How. 137, 142; *Watson v. Campbell*, 56 Ark. 184; *Powers v. Larabee*, 2 N. D. 141; *Finnegan v. Gronerud*, supra.

Sp. Laws 1891, c. 312, is unconstitutional. Const. art. 4, § 33. This provision prohibits special acts of incorporation. *Brady v.*

Moulton, 61 Minn. 185; *State v. Wiswell*, 61 Minn. 465. The act creates a corporation, and does not grant additional powers to an existing corporation, as in *Green v. Knife Falls Boom Corp.*, 35 Minn. 155. But if it adds to the powers of an existing corporation, it is unconstitutional, because the subject is not expressed in the title. *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 79, 85. The taxes were not properly levied and extended on the tax list. The levy was void as to the "general fund" and the "sinking fund," because such funds are unknown to the law. *Chicago v. People*, 163 Ill. 616. The letter from the clerk of the board to the county auditor was not such a certification as to authorize the extension of the levy. A certificate in proper form is a prerequisite to the power of the auditor to extend the tax. *People v. Smith*, 149 Ill. 549; *Chicago v. People*, *supra*. The certificate was required to be an attested copy of the record, because there can be no valid levy without a record of it. *Moser v. White*, 29 Mich. 59; *O'Neil v. Tyler*, 3 N. D. 47; *Hawkins v. Intendant*, 63 Ga. 527, 530.

George E. Arbury, for plaintiff.

McCordic & Crosby, for Board of Education of the City of Duluth.

COLLINS, J.¹

In proceedings to enforce the collection of taxes on real property in the county of St. Louis remaining delinquent and unpaid for the year 1896 (G. S. 1894, c. 11), the West Duluth Land Company, whom we will call the "objector," filed an answer, in which questions were raised by it as the owner of several tracts of land against which judgments were sought. A trial was had by the court, and upon its findings of fact it ordered, as a conclusion of law, that judgments be entered as demanded. Thereafter the court certified several points or questions, raised by the objector, as provided for in G. S. 1894, § 1589, which we will state in our own language, and consider *seriatim*.

1. Was it any defense that the objector's property was assessed at more than twice its value in money, and more than twice what it would have then sold for at a fair cash sale? And was it any de-

¹ START, C. J., took no part.

fense that the property, suburban in its character, was systematically assessed at more than its full value in money, while central business property was systematically assessed at not more than half its money value, while intervening property was variously assessed at from half its true value up to such true value?

In the recent case of *State v. Lakeside Land Co.*, 71 Minn. 283, 73 N. W. 970, certified up as this was, it was held, after a very extended and careful consideration of the point (fully evidenced by the exhaustive and complete opinion), that:

"If the assessment of a taxpayer's land is impartial, equal and fair, compared with the average valuation of other lands generally (except particular omitted or undervalued tracts) in the same taxing district, the fact that certain particular properties have been intentionally and wilfully omitted from the tax lists, or intentionally and wilfully undervalued, is no defense, either partial or total, to the application of the state for judgment for the amount of taxes levied against the land."

The only difference between the cases is that in the one from which we have quoted one-third of the taxable property of this same county was either omitted from assessments, or undervalued, through the intentional and unlawful manipulations of the assessors and other tax officials, and, as a consequence of these wilful omissions and undervaluations, the objector's lands had to bear much more than their fair share of the burdens of taxation; while in this case a systematic method of assessing this objector's lands, suburban in character, at more than twice their value in cash, and at the same time systematically assessing central business property in the same taxing district at not more than half its cash value, resulted in the same thing,—the imposition upon this objector's lands of more than their fair share of the burden. The result was the same, and, if this be so, the unfair and illegal methods adopted to accomplish it cannot affect the owner's rights or remedies. They would be the same in each case. And the consequence of permitting a defense based upon these facts would be the same.

The objector here made no offer to show that its property was assessed on a greater valuation than other suburban property, and, according to its offer, central business property was valued for as-

assessment purposes at half its value or less. If no other property owner objected on this ground, and the relief demanded here had been granted, it is certain that this objector's property would have been taxed upon a greatly reduced valuation, as compared with other suburban property, and that the central business property mentioned would have been taxed upon the unequal valuation of which complaint is made. As was said in the Lakeside case, the inevitable result would be to increase existing irregularities, instead of removing them. This objector would pay a smaller tax in proportion to the real value of its property than all other taxpayers, except such as owned the business property referred to.

We conclude, as indicated in the opinion in the case just mentioned, that the taxpayer has a remedy for just such official misconduct as that alleged in the offer upon which is based the question now under consideration, and that he must attempt to correct a grievance of this character before tax proceedings reach the time for answering. It is his right to appear before the town, city or county board of equalization if he wishes to correct errors as to the assessment of his own property, and also if he feels that he has been aggrieved in the omission of property belonging to others from the assessment rolls, or that such property has been undervalued. Again quoting from the Lakeside case, at page 288:

"These things can all be corrected, then, so as to produce entire equality among all taxpayers, and without loss or embarrassment to the public. And we must assume that these boards will do their duty, and correct all such omissions and undervaluations, if brought to their attention."

The conclusion in that case was that the partiality, unfairness or inequality in an assessment which may, under the tax law, be interposed as a defense to the entry of judgment, refers only to a partiality, unfairness or inequality in the assessment of the objector's land as compared with the general average assessment of other lands in the same district, the correction of which will result in equality among all taxpayers. Such was not the case which the counsel for the objector offered to make out by proof. The first question is answered in the negative.

2. The second point certified raises: First, the question of the constitutionality of Sp. Laws 1891, c. 54, § 13, and, second, the question, if this law is valid, could the board of park commissioners, after October 1, legally certify to the county auditor the amount of tax to be levied?

The constitutional question is whether, under the fundamental law, the board could be empowered by the legislature to determine the amount of tax to be levied each year for park purposes. Under the terms of this section the board is authorized to determine the amount, but it cannot exceed the sum which may be raised by a tax of one-tenth of one per cent. upon each dollar of valuation. That an exercise of the power to tax is legislative, and that under this section this power was conferred upon the board, is admitted; and it is also admitted by counsel for the objector that the power to determine the amount of taxes to be levied for park purposes might be conferred by the legislature upon one or more legislative representatives of, and selected by, the people of the municipality, and that this board might act in respect to the amount if their action was consented to, or approved, by the legislative body of the city, the common council. So the contention of counsel finally resolves itself into the claim that under the constitution the legislature is unable to delegate its legislative power to an administrative and appointive body or agency of a municipality, such as the park board, the members of which are appointed, not elected.

Passing by the position of counsel for the state that, when the legislature itself fixed the maximum limit of taxation for park purposes at one-tenth of one per cent. of the valuation, it legislated for itself on this subject, and that this fact distinguishes the present case from all of the cases cited by the objector's counsel, we are of the opinion that they are in error when (conceding that the power in question may be delegated to an elective body selected by the citizens of the municipality) they assume that the legislative power cannot be conferred upon an appointed body of the same municipality. We are not advised of any constitutional provision which forbids the exercise of legislative power by an appointive agency. In a state with a constitution not distinguishable from our own, so far as this point is concerned, it has been held directly

that the state could exercise its supreme power of taxation through an agency appointed by the executive under legislative authority. *Burgess v. Pue*, 2 Gill, 11; *Mayor v. State*, 15 Md. 376. Practically the same thing was held in *State v. District Ct. of Hennepin Co.*, 33 Minn. 235, 22 N. W. 625. And it is a well-known fact that this power has often been conferred upon, and is annually exercised by, appointive bodies or boards in many of the municipalities of this state.

By the terms of said section 13 the park board is required annually to certify to the county auditor, on or before October 1, the amount required to be levied as a tax for park purposes. The amount now in question was not certified until October 14, and was then, in form, extended by the auditor upon the general tax lists, which lists he should have completed on or before the first of January thereafter. G. S. 1894, §§ 1560, 1562. This statutory provision as to the time for certifying is merely intended for the guidance of the park board, and is designed to insure an orderly and prompt performance of a public duty. It is simply directory, and a failure to certify on or before October 1 does not affect the taxpayer, injuriously or otherwise. See *Kipp v. Dawson*, 31 Minn. 373, 381, 17 N. W. 961, and 18 N. W. 96; *Banning v. McManus*, 51 Minn. 289, 53 N. W. 635. An omission to certify on or before the last day mentioned cannot be a defense to the proceedings, because it cannot affect the substantial merits, nor could it have resulted to the prejudice of this or any other objector. The questions raised on the second point are answered—First, the statute in controversy is constitutional; and, second, the certification was within time.

3. The third point certified is as to the effect of Laws 1895, c. 289, under which county bonds have been issued, upon the very drastic provisions found in Sp. Laws 1877, c. 63, § 10, and also as to the effect of the findings of fact respecting the sale of the bonds just mentioned.

In 1877 the financial condition of St. Louis county was such that radical measures became absolutely necessary, and a refunding scheme led to the enactment of chapter 63, *supra*. Section 9 seems to have been drawn with a view of covering the ground, but by the terms of section 10 it was made unlawful for the county officials to

levy any tax to pay either principal or interest "of any bonds not issued under the authority of this act," until further legislation thereon. The question really is whether, by implication, the provisions of chapter 63, *supra*, which forbid the issuance or payment of other than the refunding bonds, were repealed by the general law of 1895. This law, which expressly authorized any county in the state (making no exceptions) to issue bonds to build roads and bridges, was clearly hostile to the special law, previously enacted, which prohibited the further issuance of any bonds by the county therein named. These laws cannot be harmonized, and, as a consequence, the special law stands repealed. Again, the inhibition found in the 1877 law was only operative "until further legislation" upon the subject of county bonds. In the statute of 1895 we find further legislation upon this subject, and this removed the inhibition.

Under the provisions of section 4 of chapter 289, *supra*, a sale of the bonds issued thereunder at less than par value was forbidden. The bonds now under consideration, \$140,000 in amount, were turned over to a broker for sale under a written contract with the board of county commissioners. In this contract it was stipulated that the broker should pay for lithographing and printing the blank bonds, for legal advice and services, and all other expenses incident to a sale, for which and as compensation in full, he was to receive the sum of \$14,000,—10 per cent. of the face value of the bonds sold. On these facts we are asked to hold that there was a plain violation of section 4, and that the bonds are void. There might be cases where the facts would very conclusively show that an agreed compensation of 10 per cent. for the sale of bonds was a palpable evasion of such a section, but we have no such case before us. We cannot say, as a matter of law, that under the conditions of this contract there was a violation of section 4, which forbids a sale of the bonds at less than par value.

We hold, as to the third point, that, in so far as the question is raised by the answer herein, the bonds issued under the provisions of Laws 1895, c. 289, are valid, and the tax levy for the payment of principal and interest of the same may be collected in these proceedings.

4. The fourth point certified is disposed of by the conclusion reached in the preceding subdivision of this opinion, and the fifth is fully covered in the latter part of the second subdivision, in which we held that the requirement as to the time when the amount of the tax levy for park purposes had to be certified to the county auditor is simply directory.

5. In the sixth point presented by the certification of the court below several questions are raised, but all can be disposed of by considering the objector's claim that Sp. Laws 1891, c. 312, entitled "An act for the formation and to fix the boundaries of the independent school district of the city of Duluth in St. Louis county, Minnesota, and to provide for the election of members of the board of education of said district and define the powers of the board," is unconstitutional; and the further claim, if that just noted is not sustained, that the tax which was attempted to be levied for the purposes of this school district was not properly levied or extended on the tax lists.

At the time of the enactment of chapter 312, *supra*, which was approved and took effect April 14, 1891, the state constitution (subdivision 7, § 33, art. 4) prohibited special or private laws "for granting corporate powers or privileges, except to cities." This subdivision forbade the granting of corporate franchises—that is, franchises by acts of incorporation—except to cities, and so the inquiry is, was a prohibited franchise granted when the act was passed? If so, the law must be held to be within the inhibition. The act is somewhat peculiarly worded, and seems to have been introduced as house file No. 1,251. The reasons for some of its provisions may be easily understood by reference to Sp. Laws 1891, c. 56, which was an earlier bill, being house file No. 994, and provided for an extension of the limits of the city of Duluth by the annexation of two villages and some adjacent territory. A part of the territory described in the first section was then included in the city. That part of said territory exempt from the operation of the act until January 1, 1893, or until an earlier day, if the legal voters of the village so elected, was the village of Lakeside. A part of the territory described in section 2 was then the village of West Duluth, and all of said territory, it was provided, should become a part of

the city January 1, 1894. A part of the territory described in section 3 was then the village of New Duluth, and all of this territory was to be annexed to and become a part of the city January 1, 1895. This act was approved and took effect April 2, 1891,—12 days prior to the day upon which chapter 312 became a law.

The fact that such an act as house file No. 994 (chapter 56) had been introduced into the legislature, and was in the process of being passed, explains why house file No. 1,251 (chapter 312) should include, as it did, all of the territory within the city limits at the time of its introduction, and also all of the territory to be annexed under the provisions of said chapter 56. But it did not describe or include any other territory, although provision was made generally (section 1) for territory which might be afterwards brought within the city limits. So the fact was that prior to the passage of chapter 312 all of the territory therein described as comprising the school district was then actually within the city limits, or was thereafter, and upon certain fixed days, to be within these limits through the operation of a previously enacted law. To express this in different language, the boundary lines of the school district were exactly those of the city as its boundaries had been prescribed in chapter 56, several days before. And the legislation was in fact for a city. Chapter 312 simply provided that the city of Duluth should be an independent school district, its board of directors to bear the corporate name of "The Board of Education of the City of Duluth." Provision was made for the annual election of members of the board from among the qualified electors of the district, and, as a consequence, of the city; and their duties and powers were prescribed. This entire act could have properly been made a part of the city charter, for under it the schools of the city are nothing but one of its executive departments.

City charters in which were provisions for the organization and government of school districts, with boundaries coincident with those of the municipality, were frequently enacted in this state, until the passage of special laws for such incorporations was prohibited by the constitutional amendment of 1892. Such provisions are germane to the general subject—that of creating a municipal corporation. See *City of Winona v. School District*, 40 Minn. 13,

41 N. W. 539; State v. La Vaque, 47 Minn. 106, 49 N. W. 525. And under such charters schools within these districts have been, and now are, treated and managed as an executive branch or department of the municipal government. That chapter 312 was nominally an independent act, and not in terms made a part of the city charter, through an amendment or otherwise, cannot affect the fact that the powers and privileges therein granted and conferred were to a city and for city purposes, and therefore that there was no infringement upon the constitution as then framed.

There is nothing in the further claim of counsel that the subject of the act was not expressed in the title, and therefore unconstitutional.

As before stated, the further claim is made, on this point, that the taxes attempted to be levied for school purposes were not properly levied or extended.

The first proposition is that the levy was in fact made for purposes unknown to the law. The resolution in words apportioned the total amount levied to three funds, namely, general, building, and sinking, a stated sum to each, and it is insisted that no levy can lawfully be made for the purpose of creating either a general fund or a sinking fund. The board was expressly authorized by statute annually to determine the amount of tax to be raised for the purpose of keeping the schools in operation, not less than twelve nor more than forty-four weeks each year. G. S. 1894, § 3809. Excepted from this was such amount as it might be necessary to raise for the erection of school houses and the purchase of sites. By sections 3806 and 3807 the voters of the district were authorized to determine the amount of money necessary to be raised for the erection of buildings or the purchase of sites, and the board was authorized, when such determination was made, to levy the required tax, not exceeding eight mills on the dollar in any one year; and by the eleventh subdivision of section 3808 it has been made the duty of the board to provide for the prompt payment at maturity of the principal and interest of any indebtedness of the district by levying taxes sufficient to meet the same. And it was quite clear from the resolution that the board was levying taxes for the three distinct purposes authorized by the sections above mentioned, and,

further, that the classification adopted was a proper one. The levy specified as "general fund" was for the maintenance of schools (section 3809); that mentioned as "building fund" was for the erection of school houses or the purchase of sites (sections 3806, 3807); and that distinguished as the "sinking fund" was a levy to meet the principal and interest, as it matured, of the indebtedness of the district (section 3808). Each item thus designated was exclusively for the purpose named, which was sufficiently definite for all practical purposes. We think any one advised of the classes of taxes which might be lawfully levied would have no difficulty in understanding the resolution.

The second proposition is that the letter from the clerk of the board to the county auditor was not a proper certification, and was insufficient to authorize the latter to extend the school tax upon the tax lists. The letter in question was of date October 6, and advised the county auditor that at a regular meeting of the board "the following resolution was unanimously passed." Then followed a copy of the resolution before mentioned. This letter was signed by the clerk pro tem. of the board, and its seal was attached. The duties of the clerk are prescribed in section 3802, and, among other things, he is to

"Furnish to the county auditor, on or before the tenth day of October in each year, an attested copy of his record, stating the amount of money voted to be raised by the district, for school purposes, at any annual or special meeting, or by the board of education."

It is the position of counsel that this provision of the section is mandatory, both as to the person who is to furnish the auditor with the information and the precise manner in which this is to be done; and that it not only imposes a duty upon the clerk, but strict compliance is a prerequisite to the extension of a valid tax. In section 3807 we find a special provision as to the amount of tax levied for the erection of buildings and the purchase of sites. Such amount is to be certified to the auditor by the chairman and secretary of the board; and in section 3809 we find that it is the duty of the board itself, on or before October 10 of each year, to "make known" to the auditor the amount of tax determined upon for

general purposes; that is, for ordinary expenses. There seems to be no special provision on this subject relating to taxes levied to meet existing indebtedness not yet due,—the indebtedness mentioned in the eleventh subdivision of section 3808. These various provisions as to certifying to the auditor do not harmonize, and it follows, if no other reason existed, that all are not mandatory. If all are not of this imperative nature, which one is, if either? We are of the opinion that the rule to be applied as to the manner of performing the act of advising or notifying the auditor of the amount of the tax levy is that so thoroughly established and hereinbefore cited with reference to the time within which an act is to be performed. A disregard of the exact method prescribed by statute for the performance of the act in question cannot injuriously affect the rights of the taxpayer. It is of no consequence to him whether an attested copy of the resolution be forwarded to the auditor, or a letter containing a simple copy, with the information that it is a copy. As was said in *Torrey v. Inhabitants*, 21 Pick. 64, at page 67:

“Many regulations are made by statute, designed for the information of assessors and officers, and intended to promote method, system and uniformity in the modes of proceeding, the compliance or noncompliance with which does in no respect affect the rights of taxpaying citizens. These may be considered directory; officers may be liable to legal animadversion, perhaps to punishment, for not observing them, but yet their observance is not a condition precedent to the validity of the tax.”

See, also, *Sutherland*, St. Const. § 451; 23 Am. & Eng. Enc. 458, and cases cited.

Finally, upon this point, the law especially provides that on a trial of the issues made by an answer in tax proceedings all technicalities and matters of form shall be disregarded, and also that no omission of any of the things by law provided in relation to the assessment or levy of taxes or of anything required to be done prior to the filing of the tax lists with the clerk of court, shall be a defense, unless it is also made to appear that such omission has resulted to the prejudice of the objector, and that there has been, in addition, a partial, unfair and unequal assessment. G. S. 1894.

§§ 1586, 1588. The objector here could not have been prejudiced by means of the course pursued by the board of education, or its clerk, when the auditor was advised of the amount of the tax levy.

On the sixth point we answer that, in so far as the question has been presented, said chapter 312 is not opposed to the constitution; and, further, that the taxes involved were properly levied and properly extended on the tax lists.

This disposes of the case, the result being that judgment must be entered as ordered in the court below.

STATE ex rel. CITY OF DULUTH v. ST. PAUL & DULUTH RAILROAD
COMPANY and Others.

February 2, 1899.

Nos. 11,370—(166).

75	473
79	58
75	473
80	114

Mandamus—Alternative Writ under G. S. 1894, § 5977—Bridging Railway Tracks at Street Crossing—Trial.

In mandamus proceedings to compel a railway corporation to bridge its tracks where they cross a public street, the trial court, upon the hearing of a return to an alternative writ issued under G. S. 1894, § 5977, may determine from the evidence what plan ought to be adopted to best accomplish the desired object, and may entirely disregard plans and specifications for such a bridge, made a part of said writ, and may order the bridge to be constructed in accordance with new plans and specifications; and, for the purpose of determining the kind of a bridge to be built, may have expert evidence on the subject.

Same—Plans and Specifications—Findings of Court.

The court has the right to direct that plans and specifications for such a bridge be prepared by an expert for its use when making its findings of fact, and may adopt as its own such plans and specifications, and may direct that the bridge be built in accordance therewith.

Same.

That such plans and specifications are prepared by an expert in the employ of the municipality, which, through its council, institutes proceedings to compel the construction of the bridge, is not a valid objection to their adoption by the court.

Same—Error to Incorporate New Plans in Peremptory Writ upon Ex Parte Order.

In the case at bar the court found that the plans and specifications for the proposed bridge, made a part of the alternative writ, were too indefinite and uncertain to be a basis upon which to require the same to be constructed, and then, by an ex parte order, directed that the assistant city engineer prepare and submit plans for a steel bridge to be built over the tracks at the place, of a certain width and length. Plans and specifications were made and submitted, and were thereupon adopted by the court, and incorporated into its findings of fact; the conclusions of law being that a peremptory writ should issue compelling and commanding the construction of the bridge in accordance therewith. The railway corporations against which the writ was ordered to be issued were given no opportunity to examine these plans and specifications prior to their incorporation into the findings, and in several substantial respects they were not warranted by the evidence. *Held*, that it was error to require compliance with these plans and specifications, without first giving the corporations a hearing.

Same—Construction of Bridge over Tracks of Several Companies.

When a bridge is to be built as a unit over the tracks of two or more companies where they cross a street, the court should receive evidence as to the respective interests, and should direct what part of the structure is to be built by each company. This is to be ascertained with reference to the width of its easement in and across the street, to be determined by the width of its right of way. Each company should be ordered to build that portion of the bridge which will be over its easement. If private parties are the owners of strips of land between the ways on either side of the street, the companies owning the adjoining ways must build so as to connect, unless the intervening space exceeds in width the length of the ordinary approach, each company building half way from the line of its easement to the line of its neighbor's easement in the street. A company having its right of way upon the outside must build the approach upon its side. If tracks or ways are owned jointly, the obligation to build is a joint obligation.

Appeals by defendants St. Paul & Duluth Railroad Company and Northern Pacific Railway Company from orders of the district court for St. Louis county, Ensign, J., directing a peremptory writ of mandamus to issue, and denying a motion for a new trial. Reversed.

Hadley & Armstrong, Charles W. Bunn and J. L. Washburn, for appellants.

J. B. Richards, Attorney for City of Duluth, for respondent.

COLLINS, J.

These two appellants and another railway company own 12 tracks, which, at grade and in close proximity, cross, or in part cross, Garfield avenue, in the city of Duluth, an avenue which extends from Superior street southerly along what is well known as Rice's Point. Some of the tracks are owned by the companies severally, and some are owned jointly. In 1896 a resolution was passed by the city council requiring these three companies to construct a continuous steel bridge or viaduct, with the necessary abutments, from Superior street, over all of the tracks, as laid across the avenue, a distance of 2,375 feet. The companies refused to comply with the resolution, and there was a mandamus proceeding to compel a compliance.

At the hearing, evidence was introduced tending to show that public necessity did not require the tracks to be bridged at this point, and, further, not only that the plans and specifications attached to and made a part of the alternative writ were too indefinite and uncertain to be a basis upon which to require the construction of a proper bridge or viaduct, but that the structure shown thereby would be unnecessarily extensive and expensive, and in excess of the public demand. The court found as a fact that public necessity and welfare required and made necessary the construction of a steel bridge on the avenue over and across the tracks, and this finding, although challenged by appellants' counsel, was well supported by the evidence. We need say nothing further on this point. The court then found that a bridge somewhat shorter and narrower than the one proposed was required, and fixed the terminal points therefor.

As a conclusion of law it ordered the issuance of a peremptory writ of mandamus commanding and compelling the companies, naming each, at their own expense, to proceed immediately to construct and complete a steel and iron bridge or viaduct over and across these tracks, with all necessary approaches and appurte-

nances, and in accordance with certain plans and specifications prepared by the court and under its direction; and filed with the findings of fact and order for the issuance of a writ a copy of said plans and specifications, to be made a part of the writ. After an unsuccessful attempt on the part of counsel for appellants St. Paul & Duluth Company and the Northern Pacific Company to secure a modification of the findings and order, said counsel moved for a new trial. This appeal is from an order denying the motion.

1. It is urged by appellants' counsel that the proceedings should have been dismissed when the court determined that the plans and specifications made a part of the alternative writ were so indefinite and uncertain that nothing could be done thereunder.

This amounts to the contention that the peremptory writ in such a proceeding must conform to the alternative writ, and cannot depart or vary from the latter in its commands as to the length, width, size and character of the structure to be erected, although a trial has been had for the express purpose of determining what kind of a bridge is needed. There is no merit in this contention, for, as was well said in *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153, "this proceeding is sufficiently elastic to enable the court to determine upon trial the plan which ought to be adopted to accomplish the ends in view." More than this, in each of the appellants' answers the kind and character of the needed bridge were put in issue, and the court was asked, if it should find a bridge necessary at this point, to "determine and direct definitely the nature, extent and character of such structure to be built." The trial court had full power, and it was its duty, to take evidence for the purpose of ascertaining the kind of bridge best suited for the purpose, and, if necessary, to direct that new plans and specifications be prepared for its information and for the guidance of the parties upon whom rested the obligation to build.

2. It follows that there was no error in receiving the testimony of the witness Duffies as to the proper dimensions of a structure to be built by appellants across these tracks. The court could not determine what kind of a bridge was reasonable and necessary without expert evidence, and the defiant attitude of appellants, and their evident purpose to refrain from aiding in any attempt to fur-

nish information upon this branch of the case, compelled the court to rely largely upon the evidence produced by the city.

3. This is true, also, of the claim made by appellants that because Mr. Duffies was in the employ of the city he should not have been appointed special referee to draw plans and specifications for the bridge which the court finally ordered to be built. It is also urged by counsel that the court had no power to appoint such a referee without notice to appellants, but there is nothing in this. The court was not required, even if it had the necessary skill for such work, to prepare the plans and specifications for the kind of bridge it had determined should be built, and it had the right to select any competent person to prepare for it such plans and specifications, just as it had the right to adopt plans and specifications already prepared, if found suitable and satisfactory. While in the order appointing Mr. Duffies he was designated as special referee, he was in no sense a referee, and performed none of the duties of a referee. He was nothing more than an agency employed by the court, because of his special skill and fitness, to prepare a portion of its findings of fact, his appointment being "for the purpose of preparing, under the direction, and for the use, of this court, general plans and specifications and detailed drawings." So prepared, submitted, and incorporated into the findings, the plans, specifications, detailed drawings, etc., became those of the court itself.

4. But these plans and specifications were never submitted to an inspection or examination in behalf of the appellants, and in several essential particulars they were not justified by any evidence introduced upon the trial. It seems that after the trial the court, by an ex parte order, appointed Mr. Duffies for the work above mentioned, and thereupon he proceeded to examine the locality, to make surveys, and to take soundings for the purpose of preparing suitable plans and specifications for a bridge altogether different in many ways from that specified in the alternative writ; the plans and specifications now involved being the result.

It might be that, if the appellants had been given an opportunity to be heard prior to their adoption by the court, an objection that in some substantial respects they were unwarranted by the evidence would not now be available, because the appellants could

have there pointed out wherein the evidence had been disregarded or was wanting. And it might be that, if there was no evidence as to matters of mere detail in the work, matters which in no manner affected the substantial rights of appellants, there would be no ground for complaint simply because they were not given a hearing before plans and specifications in which these details were fully covered were adopted. But such is not the present case. We need not particularize wherein there was no evidence upon which could be based certain material parts of the plans and specifications,—matters of substance, and not mere detail,—for it is unnecessary. An opportunity to point out and to be heard upon these very important matters should have been afforded the appellants before the plans and specifications in question were incorporated into the findings, and a peremptory writ ordered.

5. As before stated, the court ordered that its mandatory writ be issued commanding and compelling these three railway companies, naming each, at their own expense to proceed immediately to construct and complete the bridge in accordance with the plans and specifications prepared by Mr. Duffies. No apportionment, either of cost or parts to be constructed, was made, and counsel for the city admits that the order must be construed as imposing upon each of these companies the duty of constructing the entire structure, with abutments and filled approaches. With one of the companies—not either appellant—possessed of property of little value, and that in the hands of a receiver, and with their distinct track ownership and unequal interests, it will be seen that a mandate of this character, requiring the expenditure of a large sum of money, and upon which contempt proceedings may be predicated, may prove to be a very serious matter to one or more of the parties. We are unable to discover on what principle it can be sustained. In so far as the legal obligation to bridge the tracks is concerned, it is impossible to say that it is joint, or to see why one company should be compelled to perform the duty of another. The obligation to build, although common, is not joint, but several, except as to those tracks jointly owned by these appellants. And their several obligations should have been determined and adjusted by

the court when making its findings of fact and conclusions of law, as was done in *State v. Minneapolis & St. L. Ry. Co.*, supra.

6. This brings us to a consideration of the rule to be applied when adjusting the different obligations of these three companies, and apportioning the cost of the structure between them in accordance with their interests.

In the case just mentioned there were but two companies interested, and it was contended by one that the cost of a bridge across their tracks should be adjusted on the basis of mileage, or use of the tracks. But the court decided against this contention. It was determined that, as the duty of each company to bridge its own tracks was absolute, and independent of a like duty resting upon the other company, each must build that part of the bridge over its own tracks, the company having an outside track to build the approach adjacent thereto. At first glance it may seem inequitable for the owner of an outside track to bear all of the cost of constructing an approach upon his side, but he has a much more advantageous position for business, and, like the owner of a corner lot under some circumstances, is obliged to bear more than its percentage of the burden. The court below must determine what portion of the structure, treated as a unit, must be built by each company, and the rule for so determining is, in effect, that formulated in the case in 39 Minn. 219, stated, perhaps, with more particularity and precision.

The portion of the bridge which each company should be ordered to build must not only be that over its tracks, but must be ascertained and determined with reference to the width of its right of way, for the presumption is that each company has obtained such way with an expectation to occupy the same with tracks in the future. Therefore to compel each company to build over its own tracks and half way to the tracks of its neighbor upon either side might prove very unjust. It is the duty of each company to build that portion of the bridge which will be over the easement it has in and across the avenue of the same width as its right of way on each side. A company having its right of way and easement upon the outside must build the approach upon its side. When the tracks or ways are owned jointly, the obligation to build is a joint

one, of course, to be performed by both of the interested companies. The record fails to show the fact, but possibly private parties are the owners of strips of land between the different rights of way upon either side of the avenue. If so, it is obvious that no obligation rests upon such parties to participate in the construction of this bridge. Nor should the expense be borne by the city, save under exceptional circumstances.

Our opinion is that this burden must be placed upon the companies owning the adjoining ways, unless the intervening space should exceed in width the length of the ordinary approach to the structure. If there be such intervening spaces, each company should be required to build half way from the line of its easement to its neighbor's line, unless they should be excessive, as above stated. The court below should be advised by proper evidence as to the rights and interests of the respective parties, for the purpose of apportioning the work to be done in accordance with the rules herein stated.

The conclusions of law are set aside, and the order denying a new trial is reversed, in so far as to grant a new trial for the sole purpose of ascertaining what plans and specifications should be adopted for the construction of the bridge described in the seventeenth subdivision of the findings of fact, namely, a bridge 54 feet wide, extending over and across all of the railway tracks, and with terminals as therein fixed, and for ascertaining and apportioning the parts of said bridge to be built by each of the companies in accordance with the foregoing rules for such apportionment. When a new trial is had upon these matters, the court will amend its findings of fact so as to cover the new matter, and will then file new conclusions of law. It is so ordered.

ST. GEORGE R. FITZHUGH and Others v. LUCY GRAY HARRISON.

February 2, 1899.

Nos. 11,892—(239).

75	481
84	888
75	481
85	187

Construction of Contract—Liability of Estate of Decedent.

A certain contract construed, and *held*, that it imposed a contingent liability upon appellant's testator, which became absolute at or before his death, and was provable against his estate.

Appeal by defendant, as executrix of the last will of Matthew B. Harrison, from an order of the district court for St. Louis county, Ensign, J., denying a motion for a new trial. Affirmed.

Walter Ayers and *W. W. Henry*, for appellant.

Billson, Congdon & Dickinson, for respondents.

START, C. J.

The respondents presented a claim in the probate court of the county of St. Louis against the estate of M. B. Harrison, deceased. The claim was allowed in part, and the executrix appealed from the order allowing the claim to the district court, where, upon pleadings framed, the cause was tried by the court without a jury. The trial court made findings of fact, and as a conclusion of law directed judgment in favor of the respondents against the estate of Harrison for the sum of \$27,629.88. The executrix appealed from an order denying her motion for a new trial.

The important and controlling question presented by the record for our decision is whether the trial court's conclusion of law was warranted by its findings of fact. The answer to be given to this question depends on the construction to be given to two contracts which are designated in the findings and record as Exhibits A and B, respectively.

There is little or no controversy as to the meaning and legal effect of Exhibit A. M. B. Harrison and his then partner, E. G. Handy, secured an option for the purchase of 160 acres of land in or near the city of Duluth for the sum of \$75,000, and for the purpose of obtaining the money to pay for the land they enlisted a syndicate of gentlemen, of which the respondents were members.

Thereupon, and on February 14, 1887, they executed a separate contract with each member of the syndicate, but all of the contracts were identical in their terms and conditions. Exhibit A is the contract entered into with the respondent Fitzhugh, and for convenience it is referred to as the contract with the syndicate as to the entire interest in the land.

The firm of Harrison & Handy, by the terms of the contract, agreed to resell and convey the entire land at cost price, in undivided shares, to the parties contracted with. In consideration of the benefits to accrue to the parties so purchasing and the agreement of the firm to take charge of the platting, improvement, care and resale of the land without charge to the purchasers, it was agreed that the net profits to be realized from a resale of the land, or any part thereof, should be equally divided between the firm and the syndicate. Such net profits were to be estimated on the basis of first returning to the syndicate the money invested in the purchase of the land and the interest paid by it on the deferred payments; also the principal of the deferred payments, if paid, together with all taxes, assessments, public charges, cost of deeds and recording the same, of surveys at any time made, of opening and grading streets on the land, and of other improvements of the same, and of attorneys' fees paid; treating as net profits only the excess over such outlays, actually realized from the resale of the land, whether in whole or in parts or parcels thereof. This contract also provided that whenever so much of the land had been sold that the remainder was profit, such remainder should, at the election of any of the parties in interest, be apportioned among those entitled thereto, and proper deeds of partition therefor should be made. It also provided that the firm should have the exclusive care and management of the land, and the exclusive right to sell the same, until partition thereof; that they should attend to the payment of all taxes and charges thereon, and to all work done in improving it.

It is clear from the terms of this contract that the firm were to have nothing for their services unless there was a profit as defined therein, and that they were not to bear or be charged personally with any part of the losses, if any there were; and, further, that all

payments and advances made by the syndicate for the purposes enumerated in the contract, including improvements, were made a charge on the land, as between the parties, which were to be repaid before there could be any division of profits, or partition of the land among those interested therein.

In accordance with the terms of this contract, the firm duly caused to be conveyed to each member of the syndicate his individual interest in the land, and afterwards, and before the execution of Exhibit B, the entire title thereto was vested in the respondents, in trust for all parties interested therein, one of whom was Harrison, who then owned an undivided three-twentieths of the land. Harrison succeeded to the interest of Handy in the contract, and platted the land into lots under the name of "Brookdale Division of Duluth." He sold the north half thereof, early in the year 1889, for the sum of \$86,000, subject, however, to the condition that \$46,000 of the purchase price should be immediately expended by the trustees in the erection of dwelling houses and improvements incident thereto on the south half retained by them. At the time of this sale there had been paid and expended, pursuant to the provisions of Exhibit A, for the purchase price of the land, and for taxes, assessments, surveys and other expenses, the sum of \$93,875, no part of which had been paid. Upon the completion of the sale a partition of the south half of the land was had between the owners thereof and Harrison, except the 48 lots mentioned in the contract Exhibit B, whereby 300 lots were conveyed to Harrison as his half of the assumed profits for services under the terms of the contract Exhibit A.

At or about the time of the delivery of the deeds of partition, and as a part of the same transaction, the contract Exhibit B was executed, and the sum of \$40,000 was distributed among the members of the syndicate in proportion to their respective interests. The contract Exhibit B is in these words:

"Whereas, M. B. Harrison, agent, has sold eighteen lots in the south half of Harrison's Brookdale Division of Duluth, it is agreed that, as soon as the plat of said division is duly recorded, he is to receive from the purchasers of said lots the cash payments therefor, and the notes for the deferred payments, the said cash payments

to be turned over to St. Geo. R. Fitzhugh, Tazwell Ellett, and John Hunter, Jr., trustees, to be disbursed by them to the parties entitled thereto; and the said M. B. Harrison is to have the notes for the credit payments discounted, if practicable, and turn the money over to the said trustees to be similarly disposed of. And whereas, the said trustees and M. B. Harrison have selected and set apart thirty lots upon which is to be expended the sum of \$46,000 in buildings, and said Harrison is to sell said lots and buildings for a sum sufficient to pay not less than \$600 per lot and the \$46,000 put thereon in buildings, with interest on the said \$46,000, sufficient cash payment or payments to be required to make the lots perfectly good security for the balance of the purchase money therefor; the notes for the deferred payments to be discounted, if practicable, and the money received for said lots and buildings to be paid over to the said trustees, and to be applied to pay to Gen. Jos. R. Anderson \$300, and to M. B. Harrison \$2,000, with 6 per cent. interest on said sums, respectively, from the date of the deeds of partition to so much of the south half of Brookdale Division as has been divided, said sums being due the said Anderson and the said Harrison on account of owelty of partition; and the balance of the said purchase money for said lots and buildings is (1) to be applied to pay to the owners of the south half of Brookdale Division whatever may be due them on account of the purchase price, taxes, assessments and expenditures thereon, and (2) to pay back to said owners the sum of \$46,000, expended in buildings, with 8 per cent. on \$23,000, a part thereof, from the 18th of February, 1889, till paid; and any surplus of money derived from said lots and buildings then left is to be divided equally between M. B. Harrison, agent, and the owners of said property, according to their respective shares and interests therein in accordance with the original contract between said Harrison and the owners of said tract. The said M. B. Harrison is to superintend the erection of the buildings on said lots, and as far as practicable to see that the contracts between us and Hodgson & Co. and the building contractors are faithfully performed and completed by the 15th day of September, 1889.

"And whereas, the said trustees and the said M. B. Harrison, considering the 18 lots recently sold by him and the thirty lots set apart for building purposes, and the forty-six thousand dollars to be applied to the erection of said buildings, as ample to constitute a fund sufficient to reimburse the owners of said tract for the purchase money and other funds disbursed by them, have prepared deeds for the partition and division of the remainder of said tract between said owners and said Harrison, treating the said land as representing profits, but it is understood and agreed that if, for any reason, the provision above referred to as made for the reimbursement of the owners should prove inadequate, then, and in that event, the said trustees are not to be precluded or estopped from

demanding and recovering from said Harrison in land or money an amount necessary to fully reimburse said owners.

"It is further agreed that said Harrison shall have the buildings erected on the said thirty lots insured so soon as they are turned over to him by the contractors, and as fast as the same shall be completed and accepted by him; said insurance to be taken in the name of said trustees."

Counsel for the respective parties differ radically as to the correct construction of this contract, and each has submitted an exhaustive argument in support of his contention.

It is substantially urged on behalf of the appellant that this last contract treats the first one as so far performed as to make a division advisable, and it is made; hence the second contract must be considered by itself as a mere contract of agency in a new venture, as to which Harrison is not to bear any losses or incur any liabilities, but is to receive one-half of the profits of the venture for his services. This conclusion can only be reached by assuming that the syndicate unconditionally credited the whole \$86,000 received for the north half of the land upon the \$93,875, which they had paid and advanced as provided in the first contract, leaving only \$7,875 as a charge against the residue of the land; and that this deficit, and the repayment of \$46,000 which was to be expended in buildings, and the other charges mentioned in the contract, were absolutely provided for by setting apart 48 lots, upon 30 of which houses were to be built, and that thereupon the remaining lots were divided as profits, and the first contract thereby unconditionally executed.

This assumption is not justified by the language of the contract. But, further, it entirely ignores so much of the contract as declares that the trustees and Harrison have considered the 48 lots so set apart and the buildings to be erected thereon as ample to constitute a fund to reimburse the syndicate, but if this proves, for any reason, inadequate, the trustees are not to be precluded from recovering from Harrison in land or money an amount necessary fully to reimburse the syndicate. This reservation or proviso is an essential part of the contract.

When this contract is read in the light of all that preceded and

led up to its execution, its meaning is reasonably clear. It is not an independent contract, but it is supplemental to the original contract, and conditionally modifies the latter as to the provision that no division of profits or partition of the land as profits should be made until all of the advances of the syndicate are paid. It assumes tentatively that the 48 lots, with the proposed improvements, will be sold for an amount sufficient to pay all of the charges of the syndicate for advances, including the improvements, and leave a profit to be divided between the syndicate and Harrison, who agrees so to sell the 48 lots. Upon this assumption and agreement the original contract is so far modified or departed from that the parties conditionally treat all of their land, exclusive of the 48 lots, as profits actually realized, and agree to, and do, so partition it between the syndicate and Harrison, but with an express reservation and agreement that if Harrison fails within a reasonable time so to sell the 48 lots, whereby or for any other reason the provision for the reimbursement of the syndicate proves inadequate, the trustees shall not be precluded by the premature partition of the land as profits from recovering from Harrison in land or money an amount necessary fully to reimburse the owners.

In short, the contract provides that the distribution of the residue of the land as probable profits shall not, in case the scheme adopted for the reimbursement of the syndicate proves inadequate, preclude the trustees from recovering from Harrison in land or money the equitable pro rata share of the deficit which would have been chargeable under the terms of the original contract against the lots conveyed to him as anticipated profits pursuant to the supplemental contract. After the adoption of the reimbursement scheme, if the terms of the original contract had been adhered to, and no partition made, any deficit after exhausting the 48 lots would have been a charge against the residue of the land; that is, it could not be partitioned as profits until the deficit was paid. A sale by the syndicate of so much of the residue of the land as might be necessary to pay the deficit would be, in its last analysis, the enforcement of one-half of the deficit against the half interest of Harrison in the residue. But by the supplemental contract one-half of the residue (300 lots) was conveyed to him freed from the charge for

any part of the deficit, in consideration of his agreement that the transaction should not preclude the trustees from recovering from him in land or money an amount necessary to reimburse the syndicate in case the scheme adopted for the payment of the amount due for advances proved inadequate. The one-half of the land conveyed to the syndicate as profits was chargeable with one-half of the deficit, and it would require the payment by Harrison of only one-half of the deficit in order to reimburse the syndicate.

Therefore, when the scheme proved inadequate, the contingent liability of Harrison to reimburse the syndicate to the extent of one-half of the deficit (which would have been a charge on the lots conveyed to him, if the syndicate had retained them, as provided in the original contract) became absolute. This amount he had the option, under the contract, to discharge in land or money. He did not exercise his option to discharge the liability in land, hence it became a money demand. 2 Parsons, Cont. (8th Ed.) 651. The time within which Harrison was to sell the 48 lots was not fixed by the contract, but the law implies that he was to do so within a reasonable time. If he failed within such time to sell enough of the reserved lots to reimburse the syndicate, the scheme proved inadequate at and from the expiration of such time, and the deficit would be the difference between the total amount then due the syndicate and the then value of the 48 lots remaining unsold.

It follows from our construction of these contracts that the conclusion of law of the trial court is supported by its findings of fact.

The trial court found, with other facts, that the buildings were erected upon the 30 lots referred to in the contract Exhibit B in accordance with the condition imposed by the terms of sale of the north half of the original tract; that Harrison died, testate, February 29, 1892, and that at the date of his death the 30 lots with the buildings and improvements thereon, remained unsold, and are still held subject to the rights of the members of the syndicate, and that of the 18 lots mentioned in Exhibit B 15 were sold by Harrison, and the proceeds thereof, except \$915.29, were expended by him in expenses connected with the property with the sanction of the trustees; and, further, that the value of the 30 lots, with the

improvements, at the time of Harrison's death, was \$18,802, and that they have not been of any greater value since; that the time which elapsed between the making of the contract Exhibit B and his death was a reasonable time for making the sale by him of the reserved lots and houses as provided by the contract, and that the lots which were conveyed to him on account of his services were at that time reasonably worth more than the sum for which the court ordered judgment.

It is urged by the appellant that the trial court erred in its findings as to the value of the property remaining in the hands of the trustees, and as to the value of the lots conveyed to Harrison, and also in finding that a reasonable time had elapsed before Harrison's death in which to make sales, because they are not justified by the evidence. We have examined the record, and find that there was competent evidence introduced on the trial which is sufficient to support the findings.

The trial court, in ascertaining the amount necessary to reimburse the syndicate, struck a balance between the total amount due the syndicate for advances at the time of Harrison's death, which included interest on one-half of \$46,000, and the then value of the property remaining in the hands of the trustees, and charged his estate with one-half thereof, to which interest was added from the day of his death. The appellant claims that it was error to include such interest. It was not, for by the terms of the contract interest on \$23,000 was made a part of the sum for which the syndicate were to be reimbursed out of the reserved property, or, if that proved inadequate, by Harrison in land or money. The deficit was due, according to the finding of the court, at Harrison's death, a reasonable time in which to sell the reserved property having then elapsed; hence the right to interest from that date follows as a legal conclusion.

It is also insisted that the value of Harrison's three-twentieths interest in the unsold property of the syndicate should be set off against the claim of the trustees in this case. He was a member of the syndicate, and his interest in its property is a part of his estate, the value of which can only be determined by a final settlement of

the affairs of the syndicate. It is therefore not a proper subject for set-off or counterclaim in this action.

The remaining assignments of error have been considered, but only one of them merits special mention. The exception is the contention of appellant that the claim of the respondents was a contingent one, and was not provable in the probate court. A contingent claim is one where the liability depends upon some future event, which may or may not happen, and therefore makes it wholly uncertain whether there ever will be a liability. A contingent claim, if it becomes absolute, and capable of liquidation, before the expiration of the time limited for the presentation of claims to the probate court for allowance, must be presented, or it will be barred. *G. S. 1894, § 4511; Hantzch v. Massolt, 61 Minn. 361, 63 N. W. 1069.* Now, the liability of Harrison to reimburse the trustees in this case was contingent on his performance of his agreement to sell within a reasonable time the reserved property for an amount sufficient to reimburse them; for, if he failed to perform his agreement within the time limited, the provision for reimbursement proved inadequate. He did fail to perform his agreement, hence his liability to reimburse the trustees in some amount was absolute at the time of his death. The ascertainment of the amount thereof was a matter of detail, and the claim was provable in the probate court.

Order affirmed.

BOARD OF COUNTY COMMISSIONERS OF ST. LOUIS COUNTY v.
AMERICAN LOAN & TRUST COMPANY and Others.

February 2, 1899.

Nos. 11,408—(249).

Depository of County Funds—Bond—Findings Sustained by Evidence.

Held, in an action on the bond of a depository of county funds, that the evidence sustains the findings and conclusions of the trial court to the effect that the depository was designated; that its bond was approved, and county funds deposited with it in reliance thereon; and that there

was a breach of the bond, in failing to repay the funds, to the extent for which judgment was ordered entered.

Certificate of Deposit—Board of Co. Commrs. v. Security Bank Followed.

Held, further, that the bond secured the amount on deposit, which was represented by a time certificate of deposit. Board of Co. Commrs. v. Security Bank, *supra*, page 174, followed.

Pass Book—Evidence.

A pass book kept by the depositary, containing its account with the county, *held* to have been correctly received in evidence.

Demand—Proof of Assignment for Benefit of Creditors.

The complaint alleged a demand on the depositary for the county funds, and assigned as a breach of the bond, with others, that it did not well and truly hold the funds subject to draft and payment at all times on demand. No proof of an actual demand was made, but the trial court received proof of the fact that the depositary, before the commencement of the action, made an assignment in insolvency of all its property for the benefit of its creditors. *Held* not to be reversible error.

Bill of Particulars.

It is only where an account is set forth in a pleading—that is, alleged as a cause of action, counterclaim or set-off—that the adverse party is entitled to a bill of particulars, as a matter of right, on demand.

Action in the district court for St. Louis county upon a bond executed by defendant trust company, as depositary of public funds, and by defendant sureties. The cause was tried before Cant, J., who found in favor of plaintiff, and from a judgment entered in pursuance of his findings, defendants A. W. Bradley and seven others appealed. Affirmed.

R. R. Briggs, for A. W. Bradley and others, appellants.

It was error not to exclude evidence of the account secured by the bond, because of plaintiff's failure to serve a bill of particulars. *City v. McDowell*, 12 N. Y. Supp. 414; *Supervisors v. Decker*, 28 Wis. 669; *Board of Co. Commrs. v. Smith*, 22 Minn. 97. The suit is on "an account alleged," as contemplated by the statute. See *Tuttle v. Wilson*, 42 Minn. 233; *Lonsdale v. Oltman*, 50 Minn. 52. There was no proper designation of the depositary. The complaint did not state a cause of action. *Biron v. Board of Water Commrs.*,

41 Minn. 519; *Mosness v. German-Am. Ins. Co.*, 50 Minn. 341. The contract of the sureties will not be enlarged by construction. Where a bond is conditioned to account on demand, demand must be alleged, and the time and place should be specified. *Board of Co. Commrs. v. Citizens' Bank*, 67 Minn. 236, 241; *Nelson v. Bostwick*, 5 Hill, 37; *Bellows Falls v. Rutland*, 40 Vt. 377; *Douglass v. Reynolds*, 7 Pet. 113. It is only where facts excusing a demand are alleged that allegation of demand may be dispensed with. *Board of C. H. & C. H. Commrs. v. Irish-Am. Bank*, 68 Minn. 470; *Mosness v. German-Am. Ins. Co.*, *supra*.

Washburn, Lewis & Bailey, for A. B. Chapin and others, appellants.

Wm. B. Phelps, County Attorney, for respondent.

Defendants were not entitled to a bill of particulars. *Board of Co. Commrs. v. Smith*, 22 Minn. 97; *Blackie v. Neilson*, 6 Bosw. 681; *Jones v. Northern Trust Co.*, 67 Minn. 410. The sureties are estopped to deny that the company was duly designated as depository. *Board of Co. Commrs. v. Butler*, 25 Minn. 363; *Board of Co. Commrs. v. State Bank*, 64 Minn. 180. Demand was unnecessary, since the bank placed itself in such a position that demand was useless. *Board of C. H. & C. H. Commrs. v. Irish-Am. Bank*, 68 Minn. 470. If there was a variance, it was immaterial, since defendants were not misled. G. S. 1894, § 5262; *Blackman v. Wheaton*, 13 Minn. 299 (326); *Washburn v. Winslow*, 16 Minn. 19 (33). The pass book was properly received in evidence. *Board of Co. Commrs. v. Citizens' Bank*, 67 Minn. 236.

START, C. J.

This is an action on a bond given by a depository of public funds, the American Loan & Trust Company, and its sureties. The bond recites that the trust company has been duly designated as depository of the county, and its conditions are that the trust company shall at all times hold the funds deposited with it subject to draft and payment on demand, and shall pay over, according to law, all funds which shall be deposited with it pursuant to such designation.

The complaint alleges the execution of the bond, its acceptance, the designation of the trust company as a depository, the deposit of county funds with it, and that on July 14, 1894, there was on deposit with the trust company, and upon open and current account, of the money deposited with it by the county treasurer, the sum of \$98,368.21, and the further sum of \$7,772.87; and that the county treasurer duly demanded of the trust company, on the day named, the payment of the amount so on deposit with it, which was refused; and further alleges:

"That said American Loan & Trust Company did not well and truly hold said funds subject to draft and payment at all times on demand, and did not well and truly pay over on demand, according to law, said funds deposited in said bank, pursuant to the statutes mentioned in said bond or any part thereof."

The answer of the sureties was, except that it admitted the execution of the bond, in legal effect a general denial. The trial court found upon the issues in favor of the plaintiff, except that there was no finding as to whether a demand was made for the payment of the funds on deposit with the trust company by the county treasurer. But there was a finding to the effect that on July 12, 1894, the trust company was insolvent, and duly made an assignment for the benefit of its creditors under the insolvency laws of the state, and that the assignee accepted the trust, entered upon the discharge of his duties, and at the time of the trial of this action was still acting as such assignee. As a conclusion of law, judgment was ordered for the plaintiff for the amount claimed and interest. It was entered for the sum of \$132,352, and costs, from which the defendants appealed.

1. The appellants assign as error the findings of the trial court to the effect that the trust company was designated a depository, and that the county treasurer, after it was so designated, deposited the funds with it, for the reason that none of them are sustained by the evidence.

It was not necessary to show a legal designation of the trust company as a depository. It was sufficient to show that the trust company was a de facto depository, and that the deposits were made in reliance upon the bond. *Board of Co. Commrs. v. State Bank,*

64 Minn. 180, 66 N. W. 143. The bond in question recited that the trust company had been duly designated as a depository of county funds. It is true that a depository cannot be duly designated before the bond is given and approved. G. S. 1894, § 730; Board of Co. Comms. v. American Loan & Trust Co., 67 Minn. 112, 69 N. W. 704. But a depository may be conditionally designated, the designation to become operative when the bond is given and approved (G. S. 1894, § 729), and the recital in this bond is an admission that the trust company had been conditionally designated a depository. If the bond was approved, and thereupon the money of the county was deposited with the trust company under the bond, the sureties, as against the county, would be estopped to deny that the trust company had been designated a depository, and received the money as a de facto depository, at least. Board of Co. Comms. v. Butler, 25 Minn. 363. The original bond, with the approval of the board of county commissioners indorsed thereon, was produced from the files of the treasurer's office, and evidence given tending to show that, after the approval of the bond, the county treasurer deposited the funds of the county with the trust company. Such deposit could not have been lawfully made, except under the bond; hence it will be presumed that the deposit was so made in reliance upon the bond. The findings of fact complained of are sustained by the evidence.

2. An interest-bearing time certificate of deposit was issued to the county treasurer by the trust company for \$7,772.87 of the money deposited with it. The appellants claim that the sureties are not liable, under the bond, for the funds so deposited on the time certificate of deposit. The bond covered the deposit represented by the certificate. The precise question was decided adversely to the appellants at the present term, in the case of Board of Co. Comms. v. Security Bank, supra, page 174.

3. A pass book, designated in the record as "Exhibit D," was received in evidence, over the objection and exception of appellants. This is assigned as error.

This pass book contained the account of the trust company with the county of St. Louis. The entries therein were made by its authority, in the usual course of business with its customers, and show

that the account with the county was kept in the form of an open account, the same as that of any depositor, except that monthly balances were struck and interest credited. The account also showed that the trust company was indebted to the county at the time its bond was approved and its designation as a depository became effectual in the sum of \$35,000, including interest. The appellants claim that, by this evidence, the amount of the recovery was increased by the amount to the credit of the county on the day the bond was approved, with interest. Such was not the case, and the evidence was properly received to show the application, by the act and consent of the parties, of the checks first paid, after the bond was given, to the payment of the amount previously deposited. The first item on the debit side of the account was, by such application, discharged or reduced by the first item on the credit side; so that the final balance for which a recovery was had did not include any part of the balance, either principal or interest, which was on deposit when the bond was approved. *Board of Co. Commrs. v. Citizens' Bank*, 67 Minn. 236, 69 N. W. 912.

4. It was conclusively proven on the trial by the records of the court, and the court found the fact to be, that before the commencement of this action the trust company made an assignment in insolvency of all of its property for the benefit of its creditors. By this act the trust company incapacitated itself from keeping the conditions of its bond; for, after the assignment, it had no further control of its property or business, and could not comply with any demand for the payment of deposits. No demand was necessary, under such circumstances. *Board of C. H. & C. H. Commrs. v. Irish-American Bank*, 68 Minn. 470, 71 N. W. 674.

The appellants assign as error the admission of the evidence as to the making of the assignment by the trust company and the finding based thereon. Their contention is that the complaint alleged a demand for the payment of the fund, and the court received proof of facts which rendered a demand unnecessary; that, if such new issue was to be tendered, they were entitled to the right and opportunity to meet it. This may be conceded, but there was not the slightest suggestion on the trial that the appellants were or could be prejudiced by the evidence offered. It is difficult to conceive

how it was possible for them to be, when the evidence of the fact to be proven was a record of the court. It was the fact that the trust company had, by its assignment, incapacitated itself from complying with the demand, if made, that rendered a demand unnecessary, not simply the fact of its insolvency. The latter might be a question the appellants would not be prepared to meet, but, as to the former, the improbability of any surprise or prejudice is so great that it must be assumed, in the absence of any suggestion on their part to the contrary, that there was none. The variance, then, between the allegation of the complaint and the proof was one which the trial court could, and, if applied for, should, have remedied by allowing an amendment on the trial, or even after judgment, for the substantial rights of the defendants were not affected by the reception of the evidence. G. S. 1894, §§ 5262, 5266, 5269; *Adams v. Castle*, 64 Minn. 505, 67 N. W. 637.

But proof of the fact that the trust company had incapacitated itself, by its assignment, to perform the conditions of its bond, was competent, under the allegations of the complaint. One of the breaches of the condition of the bond assigned in the complaint was that the trust company did not well and truly hold the funds deposited with it subject to draft and payment at all times on demand. This condition of the bond in view of the fact that the trust company became the owner of the funds deposited (see *Board of Co. Commrs. v. Citizens' Bank*, *supra*) must be construed as requiring the depository to hold and keep itself in readiness at all times to pay the amount of the funds on demand. Proof that the trust company made the voluntary assignment established a breach of this condition of the bond, and was responsive to the allegations of the complaint.

5. The only remaining assignment of error meriting special mention relates to the failure of respondent's counsel to furnish, on the demand of some of the appellants, a bill of particulars of the account between the trust company and the county.

The counsel for respondent, insisting that the appellants were not entitled to a bill of particulars as a matter of right, served one, as a matter of grace, after the time limited for such service if he was bound to furnish it, which was returned by the appellants. It

is only where, in a pleading, an account is set forth which is alleged as a cause of action, counterclaim or set-off that the adverse party is entitled to a bill of particulars as a matter of right or demand. G. S. 1894, § 5246; Board of Co. Commrs. v. Smith, 22 Minn. 97; Jones v. Northern Trust Co., 67 Minn. 410, 69 N. W. 1108; Dowdney v. Volkening, 37 N. Y. Super. Ct. 313; Cunard v. Francklyn, 49 Hun, 233, 1 N. Y. Supp. 877. This action is not upon an alleged account, but upon the bond, for a breach of its conditions. It is true that, to establish the breach, it was necessary to allege and prove the amount of the county funds on deposit with the trust company at the time of the alleged breach, but the accounts between the parties were the mere data or evidence tending to establish the amount of the deposit. If the complaint did not set forth sufficient particulars as to the amount of the deposit to enable the defendants to answer understandingly, and adequately defend themselves, their remedy was by motion to make the complaint more definite and certain. Such was the remedy sought and granted in the case of City v. McDowell, 12 N. Y. Supp. 414, cited and relied on by the appellants. The appellants were not entitled to a bill of particulars as a matter of right, and the trial court committed no errors in the premises of which they can complain.

Judgment affirmed.

GEORGE H. PARTRIDGE v. MINNESOTA & DAKOTA ELEVATOR
COMPANY.

February 2, 1899.

Nos. 11,412—(233).

Chattel Mortgage—Purchase from Mortgagor—Consent of Mortgagee.

A purchaser of chattels from the mortgagor, upon which there is a mortgage, takes his title free of the lien, if the sale was made with the authority or consent of the mortgagee. Such authority need not be in writing. It may be express or implied from the conduct of the mortgagee with reference to the mortgaged property.

Same—Conversion of Wheat—Evidence—Question for Jury.

Evidence considered, and *held*, that it was sufficient to require the sub-

mission of the case to the jury upon the issue whether the mortgagee consented to the sale in question by the mortgagor.

Action for conversion in the district court for Clay county. The case was tried before Baxter, J., who directed a verdict in favor of plaintiff in the sum of \$2,731.77. From an order denying a motion for a new trial, defendant appealed. Reversed.

Wilson & Van Derlip, for appellant.

Fred B. Dodge, for respondent.

START, C. J.

Action for the alleged conversion by the defendant of certain wheat, upon which the plaintiff had a mortgage. Defense that the defendant purchased the wheat, in the usual course of business, from the mortgagor, who was then authorized by the mortgagee to make the sale. At the close of the evidence, the defendant requested the trial court to direct a verdict in its favor, which was refused; and thereupon the court directed a verdict for the plaintiff for the amount claimed. The defendant appealed from an order denying its motion for a new trial.

The only assignment of error we find it necessary to consider is the one to the effect that the trial court erred in so directing a verdict. It was admitted on the trial that the plaintiff had a mortgage on the wheat; that the defendant had notice thereof; and, that it purchased the wheat of the mortgagor, and refused to deliver the same, or to account therefor to the plaintiff. It follows that the instruction of the trial court was correct, unless there was evidence in the case tending to show that the plaintiff expressly or impliedly authorized such sale; but, if there was such evidence, it was error for which a new trial must be granted. A purchaser of chattels from the mortgagor, upon which there is a mortgage, takes his title free of the lien of the mortgage, if the sale was made with the authority or consent of the mortgagee. Such authority need not be in writing. It may be express or implied from the conduct of the mortgagee with reference to the mortgaged property. *Hogan v. Atlantic El. Co.*, 66 Minn. 344, 69 N. W. 1; *Jones*, Chat. Mort. § 465; 5 Am. & Eng. Enc. (2d Ed.) 996.

After an attentive consideration of the record, we have reached

the conclusion that there was evidence tending to support the contention of the defendant that the plaintiff authorized the mortgagor to sell the wheat in question, and pay the debt secured thereby from the proceeds of the sale, sufficient to take the case to the jury.

The chattel mortgage was made by James Shea to the plaintiff upon the crops growing and to be grown upon a certain farm in his possession, to secure the payment of \$3,000. The wheat in controversy was a part of such crop. The plaintiff employed an agent, Mr. Nye, to look after the harvesting, threshing and putting the wheat in a granary or elevator. There was evidence tending to show that the mortgagor, the latter part of September, 1897, with the knowledge and consent of the agent, placed the wheat in the defendant's elevator, taking tickets or receipts therefor in his own name; that a part of the tickets were marked "Mortgaged," and the whole thereof was left in the possession of the defendant's agent, in charge of the elevator, at the request of the mortgagor. In reference to this transaction, Mr. Nye testified that it did not make any difference to him whether the mortgagor turned over the tickets, or whether he sold them, and turned over the money. The mortgage debt matured October 7, 1897, and on October 27 the mortgagor wrote to the plaintiff that he had wheat enough in the elevator to settle his claim, but stated that he did not like to sell then, as he expected a better price, to which the plaintiff replied to the effect that he believed the wise course was for the mortgagor to close out the property at once, and pay his debts. November 2 the mortgagor wrote to Mr. Nye, plaintiff's agent: "I will sell this crop when the price is where I think it is right." This letter was forwarded to the plaintiff, who, November 4, wrote to the mortgagor, stating among other matters:

"We must insist upon your disposing of sufficient wheat at once to take care of the pool matter [the mortgage debt], or else secure the money from some other source, as we will not under any circumstances permit the matter to continue as it has any longer. * * * We shall expect to hear from you at once, and trust that you will see fit to authorize Mr. Nye to dispose of sufficient of the crop to make a complete settlement with your creditors."

December 14 the mortgagor wrote the plaintiff that he could not

pay more than \$2,000 of the debt, and asking that the balance be extended until the next year. The correspondence shows that the plaintiff at first declined to entertain any proposition for an extension of the time of payment of any part of the debt. But there was evidence tending to show that negotiations were subsequently pending for the present payment of \$2,000 of the debt, and an extension until the next year of the remaining \$1,000, to be secured by the mortgagor's note, with indorsers, and that Mr. Nye, in response to an inquiry from the defendant's elevator agent, told him that a settlement had been virtually made on that basis; that thereupon the elevator agent paid the mortgagor \$1,000 in cash, and a check for an amount sufficient, with a check previously given to him, and then in his possession, to make \$2,000, in settlement of the purchase price of the wheat; that, in fact, the wheat had been sold some three days before this conversation with Mr. Nye and subsequent payment of the balance of the purchase price. The mortgagor did not turn over the checks aggregating \$2,000 to the plaintiff or his agent, but died February 21, 1898, leaving the mortgage debt unpaid. There was also other evidence given on the trial tending to controvert or explain some portions of that to which we have referred; but, upon the whole evidence, it was a question of fact for the jury whether the mortgagor was authorized to sell the wheat in question, and the trial court erred in directing a verdict for the plaintiff.

Order reversed, and a new trial granted.

CANTY, J. (dissenting).

I cannot concur in the foregoing opinion. It is true as a general rule that, if a sale of chattels by the mortgagor is made with the consent of the mortgagee, the latter, by consenting, waives his lien. The general rule is that, by consenting to the sale, the mortgagee impliedly consents that the mortgagor may receive the purchase money. But custom or the course of business may change this rule.

Every one knows that it is customary all over the wheat-growing portions of this state for the mortgagor to haul mortgaged wheat to the elevator, and store it, with notice to the elevator keeper that the wheat is mortgaged. The elevator keeper issues tickets or

receipts for the wheat, and marks them, "Mortgaged." Then the mortgagor and the mortgagee agree upon a time when the former shall sell the wheat. But no one understands that the consent of the mortgagee that the mortgagor may thus sell wheat stored in an elevator, with notice to the elevator keeper that it is mortgaged, implies consent that the mortgagor shall receive the price of the wheat. No elevator keeper who understands his business would ever think of acting on any such implied consent, or anything less than the express consent of the mortgagee that the mortgagor might receive the purchase money. Without the consent of the mortgagor, the mortgagee cannot sell mortgaged chattels at private sale, unless he has possession of them; and, even if he has possession, he is guilty of conversion for selling them without such consent. Then it is easy to understand why the mortgagee of wheat stored in an elevator, as this wheat was, must appeal to the mortgagor to sell the wheat, or proceed to replevy the same, and foreclose his mortgage. Usually, the mortgagee does much of this appealing. The mortgagor stores the wheat during the threshing season, takes the receipts marked "Mortgaged," proposes to hold the wheat for a better price, asks the mortgagee to consent to this, and there is between them just such parleying over the matter as there was in this case. But no one understands that, by urging the mortgagor to sell in such a case, the mortgagee intends to release his chattel mortgage, or authorize the elevator keeper to pay the money to the mortgagor when the wheat is sold.

The opinion of Mr. Nye, given in his testimony on the trial, that it did not make any difference to him whether the mortgagor turned over the tickets, or whether he sold them, and turned over the money, was the mere conclusion of the witness, and not evidence. Besides, it does not appear that Nye had authority to waive or release this mortgage without receiving payment thereof. In my opinion, the order appealed from should be affirmed.

ELLEN LUND v. E. S. WOODWORTH & COMPANY.

February 2, 1899.

Nos. 11,415—(235).

75	501
85	470

Death by Wrongful Act—Shoveling Grain in Elevator Bin—Negligence of Master.

In an action brought by an administratrix to recover damages for the death of her intestate, alleged to have resulted from defendant's negligence while such intestate was in its employ, it is *held* that, on the evidence, the question of such negligence, and also that of the intestate's assumption of the risk, were for the jury.

Action in the district court for Hennepin county by plaintiff, as administratrix of the estate of Emil Lund, deceased, to recover \$5,000 damages for the death of decedent. The cause was tried before Johnson, J., and a jury, which rendered a verdict in favor of plaintiff for \$1,000; and from a judgment entered pursuant thereto, defendant appealed. Affirmed.

Davis, Kellogg & Severance and *Keith, Evans, Thompson & Fairchild*, for appellant.

Mosness & Combs, for respondent.

COLLINS, J.

Plaintiff's intestate, her husband, lost his life in defendant's elevator, and while he was at work therein as a common laborer. Alleging that the death was caused by defendant's negligence, plaintiff brought this action to recover damages, and obtained a verdict.

From the evidence it appears that the deceased, his brother, and a brother of the foreman, were at work in a freight car, which was beside the elevator, getting it in condition for a load of bran which was to be shipped; when the foreman stated that he wanted his brother to remain in the car, and that one of the other men would have to go up into the bran bin to shovel. The deceased, who had worked about two months in the elevator, preferred to go up into the bin, because there was less dust there than in the car while it was being loaded, and left the car for this purpose. He went up-

stairs, and into the bin, took a shovel, and commenced work. About 20 minutes afterwards, the foreman, who had also gone upstairs, and was standing on the floor outside of the bin, and not within the sight of the man at work, asked a question, and received an answer from him. Soon afterwards the foreman spoke again, received no answer, and, thinking an accident had happened, caused the machinery to be stopped. The man had fallen into the bottom of the bin. The bran had also fallen and covered him up. Death from suffocation immediately ensued.

The bin was on the upper floor, and in a dark corner of the building. It was shown that, until the eyes became accustomed to the conditions, nothing could be seen by a man working therein without artificial light. The bin itself was 13 feet wide, 16 feet deep, and hopper shaped, the lower end being called a "leg," a spout being attached beneath, through which the contents of the bin passed as it was being emptied. So far as shown upon the trial, the deceased had worked in the bin but once, the day before the accident, and then while it was being filled, not while bran was running out. This article, it was shown, will not flow freely out of this kind of a receptacle, but it is first necessary to push a stick up through the spout, making an aperture through which the flow can be started. A man is then put into the bin, whose business it is to stand on the sides, and shovel towards the center, thus accelerating the movement. The flow is quite uncertain. Bran will bank up or adhere to the sides, and at times large quantities will suddenly give way, and fall towards the exit. This bin contained about a car load, and nearly half had passed out when the accident occurred. Undoubtedly, the deceased, while shoveling, slipped from one side of the bin towards the center, and was immediately overwhelmed and covered up by a mass of the bran which had fallen, causing him to be smothered to death in a short time. That shoveling in such a place is dangerous work seems certain.

It is the proposition of defendant's counsel that a verdict cannot stand which is based upon the claim that their client was negligent in failing to warn plaintiff's intestate of any danger there might be in doing this work, for the reason that no such issue was tendered

by the complaint. We cannot concur in this construction of the pleading.

It alleged that the bin was dark, and that defendant wrongfully failed and neglected to furnish suitable artificial light for the safety of the intestate while he was at work therein, and that defendant failed and neglected to provide suitable, or any, appliances in said bin for the protection of those who worked therein, or for the prevention of the sudden descent of bran in dangerous quantities upon such workmen; and that, by reason of this failure and neglect, the bin became and was a dangerous place in which to perform the work the intestate was sent to do, all of which was unknown to him, and which he was unable to ascertain, but which was known to defendant. This last allegation was controverted by defendant's answer, and there was considerable contention upon the trial over the issue made thereby. In fact, defendant's counsel insisted all during the trial below, and still insist, that the intestate was not entitled to warning as to dangers, because he really volunteered to leave the car, and to go into the bin, having full knowledge of the kind of work required in that particular place, and appreciating the risk. The pleading was somewhat argumentative, but was sufficient as to this particular point, and was so regarded when counsel answered, as well as upon the trial.

The court charged the jury that the only question as to proper appliances in the bin grew out of the claim that some kind of light should have been provided; so that, finally, defendant's negligence was made to depend, first, upon its failure to advise the intestate of such unusual and unexpected dangers and risks as might not have been obvious to him when going into the bin, but which might have been known to or easily ascertained by defendant; and, second, upon its alleged failure to furnish light in the bin, which might have lessened the danger and risk. Defendant did not claim to have warned Lund as to the slippery and unsafe character of the material he was handling, or the danger and risk incident to going into a bin of this size for the purpose of shoveling bran away from the sides, and towards the aperture in the center through which it ran. Nor did it claim that Lund's previous experience in this kind of work was sufficient to relieve it from responsibility. It did

contend that it had fully equipped the elevator with electric lights, among which was a movable one, to be carried about by hand, which could have been suspended inside of the bran bin. On both of these claims, we think, the question of defendant's negligence was for the jury. The foreman having charge of the work about the elevator fully knew and appreciated the risk and danger appertaining to shoveling bran in a bin of this shape and size, for the purpose of emptying it through its "leg." This was shown by his testimony.

These risks and dangers were unlike those considered in the so-called "gravel pit cases," where the workmen are constantly undermining, and the inevitable result is that the earth must fall upon those who are below and in its way; and were unlike those which attend workmen employed in handling ordinary grain, where, in its movements, the laws of gravitation operate, as a rule, steadily and with uniformity. Not so with bran in a bin which is being emptied. It is uncertain and irregular in its movements. Its adhesiveness will cause the different particles to stick together and to the sides of the bin, requiring much shoveling to detach it; and it may without warning, and when least expected, fall in large quantities, exceedingly dangerous to persons who stand upon it, as Lund was obliged to do while shoveling. While he assumed for himself the ordinary and obvious dangers of the work in which he engaged, he had the right, when sent into this place to shovel,—new employment to him,—to rely upon defendant's obligation to perform its duty. He had the right to assume that he would not, without warning, be subjected to unusual and unnecessary dangers. Of course, it is one thing for a servant to know that dangers exist in a place where he is set at work, or that there are defects in the instrumentalities furnished him with which to do the work, or that such instrumentalities are wanting, and an entirely different thing for him to know or appreciate the risks which may follow from doing the work in such a place, or in doing it with defective instrumentalities, or without instrumentalities. For instance, Lund may have known that there was danger in working in the bin with or without a light, and yet not have appreciated or even suspected the risk he was taking; for the danger was not open and patent, ordinarily discernible by the use of one's senses.

In respect to the claim that a movable light appliance was furnished, which could have been carried into the place, it is enough to say that even if it was in repair and ready for use, and this was in issue on the evidence, there was nothing to show that Lund had ever seen this appliance in use,—that is, with a light turned on,—or that he even knew what it was used for. A laboring man cannot be expected to know these things by intuition, and that is what is demanded, if counsel are right. More than this, it appeared from defendant's own witnesses that the only way in which this light could have been made available at the time Lund was set at work was by signaling the engineer stationed downstairs, and he would then start the dynamo. No effort was made to prove that Lund knew what was necessary in order to advise the engineer that a light was needed at that time of day; and, without this knowledge, the appliance was of no value to him.

We conclude that the case, as made by the evidence, was for the jury on the questions of defendant's negligence and the decedent's assumption of risk.

Judgment affirmed.

CLEVELAND IRON MINING COMPANY v. EASTERN RAILWAY
COMPANY OF MINNESOTA.

February 2, 1899.

Nos. 11,439—(242).

Shortage in Cargo of Wheat Delivered to Carrier—Weights by Minnesota Weighmaster—Mistake—Findings Sustained by Evidence.

At the request of defendant company, owning and managing a grain elevator at West Superior, in the state of Wisconsin, the Minnesota state railroad and warehouse commission has furnished and maintained at said elevator a corps of inspectors and weighmasters; and, by consent of all parties concerned, the business of inspecting and of weighing grain, in and out, has been conducted in accordance with the provisions of our laws (G. S. 1894, §§ 7645-7713, inclusive). *Held*, in an action brought by a carrier of grain upon the Lakes against defendant company to recover the value of a shortage in the weight of wheat loaded on its vessel out of said elevator, of nearly two per cent., that it is immaterial whether the

parties interested, when agreeing upon the weighmaster to weigh out the wheat, merely imported an umpire, whose decision could only be impeached on the ground of fraud or such gross mistake in weights as would imply bad faith or a failure to exercise honest judgment, or introduced into their voluntary contract for an umpire the provisions of our grain laws, and thus selected an umpire whose decision was impeachable only when it was demonstrated by clear, strong and satisfactory evidence that a substantial mistake had been made in weighing; for in either event the evidence produced at the trial was sufficient to sustain the findings of fact and conclusions of law.

Same—Deficiency of Two Per Cent.

Where it is established upon the trial that there was a deficiency of almost two per cent. (1,502 bushels) in a shipment of wheat in one vessel, intended to be of 81,000 bushels, as a matter of law it must be *held* that the error was either fraudulent, or was so gross as to imply bad faith, or a failure on the part of the umpire weigher to exercise an honest judgment when weighing out.

Negligence of Carrier not Considered.

Held, further, that the question of negligence of plaintiff carrier when receiving the wheat on board, which contributed to the error in weighing, is not before the court for review on the record.

Action in the district court for St. Louis county to recover the value of 1,502 bushels of wheat, the amount of an alleged shortage in a shipment from defendant's elevator. The case was tried before Moer, J., who ordered judgment in favor of plaintiff for \$1,994.52. From an order denying a motion for a new trial, defendant appealed. Affirmed.

M. D. Grover, for appellant.

The receipts were executed under the provisions of the Minnesota statute, and the parties accepting and purchasing them contracted that the wheat represented by the receipts should be weighed and inspected, on delivery out of the elevator, by inspectors and weighmasters appointed under that statute. The decision in *Sawyer v. Cleveland Iron Min. Co.*, 16 C. C. A. 191, to the effect that plaintiff as carrier was liable to the consignor for the shortage, though the grain was not actually loaded on the vessel, should not be followed. A bill of lading is not conclusive on the carrier as to the amount of goods received, nor is the carrier estop-

ped by statements in the bill from showing that no goods were received. *Nat. Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224. The bills of lading provided: "All the deficiency in the cargo to be paid by the carrier * * * and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee." This provision should be construed to mean that the carrier has agreed that payment of freight charges shall be made only for cargo actually loaded, and that the consignee has agreed to pay at the agreed rate for any excess in amount over that named in the bill. *Merrick v. About 19,514 Bushels of Wheat*, 3 Fed. 340; *Rhodes v. Newhall*, 126 N. Y. 574. *Sawyer & Co.* had no lawful claim against plaintiff to make good the shortage, if any. Plaintiff paid *Sawyer & Co.* when it was under no legal obligation so to do, holds no assignment from them, and has not been subrogated to any right of *Sawyer & Co.* to make claim against defendant. The finding that there was a shortage is not sustained.

Searle & Spencer, for respondent.

In case part of the cargo was not delivered it was due to mutual mistake. Mutual mistake is mistake reciprocal and common to both parties, where each labored under the same misconception of facts. *Botsford v. McLean*, 45 Barb. 478. Where parties contract under such mistake, equity has power to relieve. *Shafer v. Davis*, 13 Ill. 395; *Mays v. Dwight*, 82 Pa. St. 462; *Fleetwood v. Brown*, 109 Ind. 567. Equity will grant relief when mistake may be inferred from the nature of the transaction. *Geib v. Reynolds*, 35 Minn. 331. See *City of Duluth v. McDonnell*, 61 Minn. 288; *Cobb v. Cole*, 51 Minn. 48; *Lane v. Holmes*, 55 Minn. 379. If there was no mistake, then defendant has 1,502 bushels of wheat that do not belong to it; and its refusal to deliver, or make good on demand, constitutes conversion. G. S. 1894, § 7648; 2 Addison, Torts, § 461; *Adams v. Castle*, 64 Minn. 505; *St. Paul & S. C. R. Co. v. Gardner*, 19 Minn. 99 (132). See G. S. 1894, § 7645; *Weiland v. Krejnick*, 63 Minn. 314; *Bretz v. Diehl*, 117 Pa. St. 589. Under the terms of the bill of lading the vessel becomes surety for the delivery of the full amount of grain expressed, and under the law is compelled to make good the deficiency. *Sawyer v. Cleveland Iron Min. Co.*, 16 C. C. A. 191.

Plaintiff became subrogated to the rights of the shippers. A surety who becomes such at the request of the creditor, and without any request from the debtor, is entitled to subrogation if the debt is paid. 1 Brandt, Sur. § 260. Where an insurance company pays a loss it may sue the author of the loss without assignment from the insured. *Swarthout v. Chicago*, 49 Wis. 625. See *Heisler v. C. Aultman & Co.*, 56 Minn. 454; *Memphis & L. R. R. v. Dow*, 120 U. S. 287; *Travers v. Dorr*, 60 Minn. 173; *Emmert v. Thompson*, 49 Minn. 386; *Felton v. Bissel*, 25 Minn. 15; *Daniels v. Palmer*, 41 Minn. 116, 121. The payment by plaintiff operated as an equitable assignment. *Connecticut v. Erie*, 73 N. Y. 399; *Swarthout v. Chicago*, supra; *McArthur v. Martin*, 23 Minn. 74; *Emmert v. Thompson*, supra.

The railroad and warehouse law of Minnesota has no application. *Cooley*, Const. Lim. (6th Ed.) 149. There was no contract accepting the weights of the weighmaster as conclusive. If the statute is applicable, the section making the acts and certificates of the weighmaster final and conclusive is unconstitutional. *Cooley*, Const. Lim. (6th Ed.) 452; *Groesbeck v. Seeley*, 13 Mich. 329; *White v. Flynn*, 23 Ind. 46; *Abbott v. Lindenbower*, 42 Mo. 162; *McCready v. Sexton*, 29 Iowa, 356; *Chicago, M. & St. P. Ry. Co. v. Minnesota*, 134 U. S. 418. The state has assumed the operation of the elevators, but the duty of the officials is confined to inspection and weighing. The law does not give to the weighmaster or inspector or to any state official control over the receipt or delivery of grain. It was the duty of defendant and not the state to deliver the grain.

The cases of *Meyer v. Peck*, 28 N. Y. 590, and *Abbe v. Eaton*, 51 N. Y. 410, support the contention of appellant as to the construction of the provision contained in the bill of lading, but these cases have been overruled. As between carrier and consignee or shipper, a bill of lading containing this provision is conclusive as to the amount, and if the cargo is deficient the carrier must make it good. *Sawyer v. Cleveland Iron Min. Co.*, supra; *Merrick v. About 19,514 Bushels of Wheat*, 3 Fed. 340; *Rhodes v. Newhall*, 126 N. Y. 574. The finding as to the shortage is sustained by the evidence.

COLLINS, J.

Action by plaintiff, carrier of grain on the Lakes, to recover of defendant company, owning and operating an elevator at West Superior, Wisconsin, the value of 1,502 bushels of wheat alleged to have been short in a cargo shipped by A. J. Sawyer & Co., grain merchants, and loaded into plaintiff's vessel out of said elevator. Plaintiff had issued bills of lading to the shipper for 81,000 bushels, delivered on board, in which was the usual clause,

"All the deficiency in the cargo to be paid by the carrier (except when grain is heated or heats in transit), and deducted from the freight, and any excess in the cargo to be paid for to the carrier by the consignee."

The shortage was discovered at the point of destination, Buffalo, New York, where the grain was unloaded, and after an action had been commenced against this plaintiff, in which a judgment in its favor was reversed (*Sawyer v. Cleveland Iron Min. Co.*, 16 C. C. A. 191, 69 Fed. 211), it paid the amount found to be due, and, claiming to be subrogated to the shipper's rights, instituted this action.

1. At the shipper's request the carrier guaranteed delivery of the grain in its bills of lading. There was a deficiency, and, to the extent of its value, the carrier had to respond to the consignee, who had also, through an assignment, succeeded to the rights of the shipper. By payment plaintiff became subrogated to these rights, as fixed in the bills of lading, and could enforce the same by action, and without any formal assignment. See *Emmert v. Thompson*, 49 Minn. 386, 52 N. W. 31; *Vega S. S. Co. v. Consolidated El. Co.*, supra, page 308.

2. But it is urged by counsel for defendant that special circumstances and conditions have intervened here, were established on the trial, and have been found by the court, which, if they had been shown at the trial of the Sawyer case, would have prevented a recovery in that action, and which, as a consequence, stand in the way of a recovery here. This claim is based upon the fact that in the year 1886 the Minnesota railroad and warehouse commission resolved to furnish an inspector and weighmaster at and for this defendant's West Superior elevator, if so requested by defendant's

officers; that the commission was so requested; that it did furnish inspectors and weighmasters, and has ever since maintained, by consent of all parties concerned, a full and ample corps of inspectors and weighmasters; that the business at said elevator has ever since been conducted in accordance with the provisions of our law relating to and governing the weighing, inspection, grading, storage and transportation of grain (G. S. 1894, §§ 7645-7713, inclusive), and precisely as if said elevator had been located within the limits of this state, instead of across the Wisconsin line.

We shall assume, for the purposes of this case (although plaintiff's counsel questions it), that these facts were all conclusively established by the evidence and found by the court; and we shall also assume that with these facts in existence, known to all of the parties concerned in the storage and shipment of this grain, and acted upon by them when storing and shipping the same, a voluntary contract was entered into, whereby the Minnesota weighmaster was selected as an umpire, whose decision was to be final in the matter of weighing this shipper's grain in and out of defendant's elevator. Whether the parties interested (plaintiff, defendant and shipper), when selecting or agreeing upon the weighmaster, merely imported an umpire, or incorporated into their contract for an umpire the Minnesota grain laws, need not be decided; for if their agreement was simply as to an umpire, whose decision could only be impeached on the ground of fraud or such gross mistake in weights as would imply bad faith or a failure to exercise honest judgment, or was an agreement which included in its terms, and for the umpire's guidance and conduct, the provisions found in our grain laws, with his decision impeachable only when it could be demonstrated by clear, strong and satisfactory evidence that a substantial mistake had been made in the weighing, the evidence here was sufficient to support the findings and conclusions.

All of the grain put on board of the plaintiff's vessel, which was first-class in all respects, was carried to Buffalo. All of it was carefully removed, and, with extra care and caution, weighed on carefully tested and adjusted receiving scales, of Fairbank's make,—the same make being used in defendant's elevator,—and was run into bins apart from other wheat. The shortage was then discovered.

For greater certainty the Buffalo elevator shipping scales were then tested and adjusted, and the grain again weighed. The shortage was 1,502 bushels,—exactly what it had been when the grain was unloaded from the vessel. Of course, this fact clearly demonstrated that a substantial mistake was made in weighing the grain which actually went on board at West Superior, and this was sufficient to support a conclusion that the error was either fraudulent, or was so gross as to imply bad faith, or a failure on the part of the umpire to exercise an honest judgment when weighing out the shipment. In either case his decision could be impeached. A deficiency of 1,502 bushels in a cargo of 81,000 (almost two per cent. of the whole) cannot be accounted for as an honest mistake. It is altogether too substantial, and would mean a loss to some person, other than defendant, of nearly 40,000 bushels every time this elevator, with a storage capacity of two million bushels, was emptied. Allowance for variations in weights must be made, and the law will not notice trifling discrepancies in scales. In fact, it was shown at the trial that the expected normal variation is from 25 to 50 bushels in 100,000.

The court below found all of the facts, and also that the mistake as to the weight at defendant's elevator was mutual. As might be anticipated, the question of plaintiff's negligence when the cargo was weighed out was not passed upon; nor did defendant's counsel move that a finding be made on this, nor have they assigned error because of this omission, nor has it been referred to in their brief. As the evidence would have justified a finding that plaintiff carrier was free from negligence which contributed to the shortage, the question is not before us for review.

Order affirmed.

STATE ex rel. ISAAC M. THOMAS v. O. HALDEN and Another.

February 2, 1899.

Nos. 11,441—(250).

Tax Sale—Assignment by State—Laws 1897, c. 290.

The right of the state, conferred upon it by G. S. 1894, § 1601, to sell and convey lands acquired by it at delinquent tax sales, was not suspended or taken away by Laws 1897, c. 290.

Same—Redemption by Landowner.

The privilege of redeeming lands delinquent for taxes, granted all persons having an interest therein upon compliance with the provisions of section 3 of said chapter, terminated in all cases where, and at the time, assignments were made.

Appeal by relator from an order of the district court for St. Louis county, Cant, J., discharging an alternative writ of mandamus. Affirmed.

S. T. & William Harrison, for appellant.

William B. Phelps, for respondents.

COLLINS, J.

Appeal from an order directing the entry of judgment dismissing an alternative writ, theretofore issued and served, in mandamus proceedings against the auditor and treasurer of St. Louis county. Counsel agree upon the issue, and state it as follows:

“Did the property owners in the counties affected by Laws 1897, c. 290, have the absolute right to redeem their property from taxes delinquent on and prior to the first Monday in January, 1897, at any time on or before June 1, 1898, without paying penalties, interest or costs, or did they only have this right in case no assignment was made to a purchaser before the money was tendered for redemption?”

We quite agree with the court below, which held that the right to redeem was limited to cases where there had been no assignments by the state of its rights under the provisions of the general tax laws. G. S. 1894, § 1601. No other construction of the law can be had.

Stated concisely, its title was an act to "enforce" the payment of taxes, and to extend the time for payment of delinquent taxes, in counties where the amount of such taxes exceeds 30 mills on the dollar of the assessed valuation. There is nothing in this title to indicate the legislative intent to except lands answering this description from the operation of section 1601. Nor is there a word in the body of the law indicating such a purpose. Indeed, the title and the text of the act indicate a purpose to "enforce" payment—First, by way of an inducement to the owner of the property; and, second, by means of a sale to any person who chose to buy, which sale was to be final. A list of lands subject to this sale was to be made out by the auditor of each county affected at the time of making the list of delinquent taxes for the year of 1898, and appended thereto; and it was expressly provided that this appended list should be a list of all taxes upon real estate in the county which appear to have become delinquent in or prior to 1897, and which have not been satisfied by payment, redemption or sale of the real estate to actual purchasers, and should also be a list of all taxes upon any real estate which may have been at any tax sale struck off to, or declared to be forfeited to, the state,

"And which have not been assigned or conveyed by the state,
* * * and as to which no valid assignment has been made."

Of course, the query is, to what time do the words above quoted refer? and to this there is but one answer which will not do violence to the words used and lead to an absurdity. This language can only be construed as referring to and meaning the time when the list of lands delinquent is to be made out; that is, on or before January 20, 1898. See G. S. 1894, § 1579, which fixes the last day upon which the auditor may file his list of taxes delinquent for the preceding year with the clerk of the court.

The land here in question had been assigned by the state after the passage of the law, and prior to June 1, 1898, the last day on which the relator, as owner, could redeem, under section 3. It could not go on to the list, because of the prior assignment to a private party. It was not "subject to be included" in the list, and for that reason was not within the provisions of section 3. The ab-

surdity of construing the words used as meaning either the day on which the act was passed, or the day when the commissioners passed the resolution mentioned in section 1, is apparent, when we observe that with such a construction the power of the state to assign its rights, and to receive its dues, under the general law, or all or a part thereof, under the 1897 law, is absolutely suspended from August 1, 1897, at least, until the sale in May, 1899; and this under a law which purports to have been enacted that the payment of taxes might be enforced. As counsel for relator urge, the act was a measure of relief, but it was not enacted primarily and wholly for the relief of the delinquent taxpayer.

Order affirmed.

CATHERINE E. PUTNAM v. CITY OF ST. PAUL.

February 2, 1899.

Nos. 11,449—(243).

**City of St. Paul—Annual Expenditure for Schools—Sp. Laws 1891, c. 36
—Title of Act.**

The provisions in Sp. Laws 1891, c. 36, which take away from the governing body of the independent school district of the city of St. Paul the right to determine the amount of its annual expenditures, and vest that power in the city council, are not invalid upon the ground that the subject of the legislative act was not expressed in its title, as required by Const. art. 4, § 27.

Same—Powers of Board of School Inspectors.

Under the provisions of said chapter, the board of school inspectors have no power or authority to create any indebtedness against the city, or to pledge its faith or credit, for the ensuing school year, until the annual appropriation is made by the council. All persons dealing with the board are bound by these restrictive provisions, including teachers appointed by the board.

Same—Annual Appropriation for Salaries of Teachers.

Such part of the amount annually appropriated and set apart by the council for the compensation of teachers is so appropriated and set apart for the entire teaching force, and not for a part. If, at or prior to the end of the school year, the amount appropriated is found to be insuffi-

cient to pay full salaries to teachers, it is the duty, and it is within the power, of the board to discharge teachers, and thus curtail expenses.

Same—Payment of Salaries Monthly—Deficiency.

The amount appropriated by the council, in 1894, for teachers' salaries, was believed by the board to be insufficient to pay full salaries for the entire year, and therefore it was resolved that all salaries should be paid monthly in full, and, if there should be a deficiency, each teacher should be paid pro rata for the last month. Of this resolution the teachers were notified before commencing work, at the opening of the schools, and they were also notified that such as were dissatisfied with this condition could decline to enter upon their duties. Those whose interests are in issue here commenced to teach, were paid in full and for each month up to June 1, taught through that month, and were then paid pro rata and equitably for that month, which payments were accepted; all of the amount appropriated by the council being thus distributed and paid. *Held*, that an action to recover the difference between what was paid and what would have been paid if the appropriation had been sufficient to meet all demands cannot be maintained by a teacher.

Appeal by plaintiff from a judgment of the district court for Ramsey county in favor of defendant, entered pursuant to the order of Kelly, J. Affirmed.

Stiles W. Burr, for appellant.

Upon the proposition that the provisions of Sp. Laws 1891, c. 36, which take away from the governing body of the school district the right to determine the amount of its expenditures and vest that power in the city council, are void under Const. art. 4, § 27, because as to them the title of the act is defective and misleading, counsel cited the following authorities: *Simard v. Sullivan*, 71 Minn. 517; *State v. Sullivan*, 72 Minn. 126; *State ex rel. Bazille v. Sullivan*, 73 Minn. 378; *State ex rel. Wagener v. Sullivan*, 73 Minn. 382; *Palmer v. Bank of Zumbrota*, 72 Minn. 266; *State v. Oftedal*, 72 Minn. 498; *Winona & St. P. R. Co. v. Waldron*, 11 Minn. 392 (515); *State v. Kinsella*, 14 Minn. 395 (524); *Mississippi & R. R. Boom Co. v. Prince*, 34 Minn. 79; *Falkner v. Dorland*, 54 N. J. L. 409; *Town v. Fishkill*, 22 Barb. 634; *State v. Bankers*, 23 Kan. 499; *Adams v. San Angelo*, 86 Tex. 485; *Dorsey's Appeal*, 72 Pa. St. 192; *In re Breene*, 14 Colo. 401; *Montgomery v. State*, 88 Ala. 141; *Witzmann v. Southern*, 131 Mo. 612; *State v. Board*, 22 Nev. 399; *Ryno v. State*,

58 N. J. L. 238; *People v. Allen*, 42 N. Y. 404; *Philadelphia v. Market*, 161 Pa. St. 522; *Percival v. Cowychee*, 15 Wash. 480.

James E. Markham and Carl Taylor, for respondent.

COLLINS, J.

Action by plaintiff, a teacher in the public schools of the city of St. Paul during the year preceding June 30, 1895, to recover for herself and for four other teachers whose claims have been assigned to her, alleged unpaid portions of their salaries. We are clearly of the opinion that plaintiff cannot recover, and that the conclusion of the trial court to that effect must be sustained.

The law which governs the board of inspectors of the school district in question, upon which board the detail of management is devolved, is somewhat novel. Sp. Laws 1891, c. 36. The city is created an independent district, and the duty and power of providing funds for the expenses incident to the maintenance of all city schools is placed in the hands of the city council. This is practically the limit of the authority conferred upon the council, but as to this it seems to have been made supreme. By section 6, it is expressly provided that the expense of such schools shall not in any year exceed the amount of money appropriated and set apart therefor by such council, and its right to appropriate and set apart money for school purposes is made to depend upon the amount which will be derived by an annual tax levy, not exceeding $2\frac{1}{2}$ mills on the dollar. And in the same section it is enacted that the board of inspectors shall have no power or authority to create any indebtedness against the city, or to pledge its faith or credit, until after the council shall have acted, and shall have fixed and set apart the amount to be expended in the school year, and then only to the extent of the amount so fixed and set apart. To impress this provision upon the members of the board, a violation of it is made a misdemeanor, punishable by imprisonment in the county jail. If plaintiff's claim could be enforced she would, unwittingly perhaps, subject all members of the board who participated in the excessive expenditure to the unpleasant penalty above mentioned.

By section 3 it is provided that the school year shall extend from September 1 to July 1 and that it shall be the duty of the board of

inspectors to report to the mayor, on or before June 1 in each year, among other things, the monthly compensation that the board of inspectors recommend to be paid to each of the teachers, or class of teachers, of the public schools, and all other employees, for the following school year. It is the duty of the mayor to transmit this report, with his approval or disapproval, to the common council, and the council fixes, by ordinance, the amount of money which the board of inspectors are allowed for the purpose of maintaining the schools for the ensuing year. Section 3 also provides that monthly payments shall be made to teachers, and they are to serve during the pleasure of the inspectors. All salaries are to be fixed annually. It is further provided in section 3 that,

"As far as practicable, it shall be the duty of said inspectors in each year to appoint, not later than June fifteenth (15th), all the teachers for the next ensuing school year, and notify each teacher thereof."

It is obvious that, under these provisions, it is the duty of the board to make its report to the mayor as early as June 1 in each year, and in this report to state facts which will indicate what amount of money is needed, in the opinion of the board, properly to equip and conduct the schools for the school year commencing September 1 following. The facts detailed inform the mayor and the members of the council why this amount is needed and how it is to be expended. The duty is then on the mayor to transmit this report, approved or disapproved, or with recommendations, to the council, which is to be convened for the purpose of acting upon the same within 10 days; that is, on or before June 10. The plan is to have the council act, determine and set apart the amount to be expended for school purposes as early as June 10. This is evident from the provision last above quoted, which makes it the duty of the inspectors, "as far as practicable," to appoint teachers not later than June 15, when read in connection with that part of section 6 which prohibits the board of inspectors from binding the city on any contract until after the amount to be expended has been set apart by ordinance, and of which all parties dealing with the board must take notice.

On June 15, 1894, the board appointed a large number of teach-

ers, including all but one of those whose claims are in issue here, and that one seems to have been appointed August 28. The yearly salary of one of these persons was fixed by the board at \$750. As to the others, the salaries were declared to be according to previously prepared schedules. The appointees were notified in writing of their selection, and each accepted in the same manner, agreeing to report to the superintendent at a teachers' meeting to be held on September 4. A rule of the board, known to the appointees, also required all teachers to report at, and be present at, this meeting. The plaintiff and two of her assignors were at this meeting; the others were not. At the time of the appointments made June 15, the board had not made its report to the mayor, nor was this report in his hands until June 30. It was not acted on by the council until August 18, and then the amount estimated as needed for teachers' salaries was reduced \$17,800. It is conceded that the amount appropriated was sufficient to cover full salaries for the appointees of June 15, but was insufficient to meet the salaries in full of all teachers actually appointed and employed during the school year.

At the meeting held August 28, 1894, at which one of plaintiff's assignors was appointed, as before stated, the action of the city council, reducing the appropriation recommended in the amount of \$17,800, was discussed, and it was resolved that individual salaries should not be reduced at that time, but that if there should be a deficiency, as was expected, it should be met by a general pro rata cut in all salaries for the last month of the school year. The president of the board was instructed to notify all teachers of the situation, and of the action of the board in respect to an anticipated deficiency at the end of the year; and at the teachers' meeting on September 4, before mentioned, the president gave public notice of the exact condition in which the board was placed, and what it had resolved to do should it appear, as the end of the year approached, that full salaries could not be paid for the last month. And all teachers not satisfied with the proposition were notified that the right to resign was theirs. This was a few days before the schools opened.

Plaintiff and her assignors commenced work and taught during

the year, being paid in full for each month up to the month of June. April 3, 1895, the board, at a regular meeting, resolved that there should be deducted pro rata from the salaries to be paid for the month of June an amount equal to the deficiency, whatever it might be. July 15 the board apportioned the entire balance of the money, all that remained of the appropriation after paying full salaries up to the month of June, among all of the teachers who served during that month, pro rata, in strict accordance with its resolution adopted prior to the day in September on which these teachers began work, of which resolution they had been informed at the meeting, and then paid this pro rata sum or share to each of the teachers who so served. It is not questioned but that all of the amount appropriated by the council for teachers' salaries was distributed and paid out fairly and equitably among those who taught during the month of June, but the contention is that plaintiff, in her own right and as assignee, is entitled to recover the difference between what was paid and what would have been paid if the appropriation had equaled the demands.

On these facts, it seems clear that plaintiff cannot recover, for either of the following reasons:

1. The appointment of four of the persons whose claims are here involved, and the fixing of their salaries, was premature, and in no manner bound the city, for the reason that on June 15, when the board acted, no appropriation had been made by the council. Until such appropriation is made, the action of the board is of no validity.

2. The board is authorized to appoint teachers for the school year, and to fix salaries, but this authority is subject to the conditions found in the law under which such appointments are made. All teachers are to serve during the pleasure of the board, and those who did serve were fully advised of the exact condition of the fund out of which salaries were to be paid, prior to the day they entered upon their duties. None of those whose demands are now before us declined to commence to teach when informed that, in all probability, salaries for the month of June would be reduced because the amount appropriated by the council would prove insufficient. Instead of discharging a part of the teaching force prior

to June 1, as the board had the right to do, and thus reducing expenses so that those remaining could be paid in full, all of the teachers were retained, and the amount to be expended was curtailed by reducing pro rata the sums paid for the last month's salaries. Every teacher consented to this, by implication, when accepting work with full knowledge of the situation, and this consent is as binding as if reduced to writing. All accepted positions, entered upon the work, taught during the full term, were paid, and accepted payment, in accordance with the resolution adopted by the board weeks before their services were demanded, of which resolution they were notified, and at the same time advised of their right to resign, or to decline positions, if the existing conditions were unsatisfactory. They are not now in position to repudiate their part of this transaction, and, in an indirect way, to compel a violation of the law by the board, and the payment by the city of a sum in excess of the annual appropriation made by the council in 1894.

3. The contention of plaintiff's counsel seems to be that, when the city authorities acted and set apart for salaries a sum sufficient to pay the salaries of teachers already appointed by the board, the amount thus set apart became a sort of "trust fund," for the sole use and benefit of teachers already appointed. We have seen that these appointments were all premature and invalid, but, if this were not so, the contention is without merit. The amount appropriated is for the payment of all teachers who may be employed by the board for the school year in question. The supposition is that the board will "cut its garment according to its cloth." The sum appropriated is for the entire school year. It is also for the entire teaching force, not for a part. None of the teachers can be excluded, for all are supposed to be needed, no matter when designated or appointed to positions. The person who commenced work last is as essential to the proper conduct of the schools, and as much entitled to compensation, as the one who renders services on the first day of school. In the case at bar, the appointments made, and the salaries fixed, prior to the action of the council, were wholly conditional, and every appointee was bound to take notice of the law in respect to this matter. Every one knew that the action of the board was provisional, and subject to the control of

the council in making appropriations. Before the work of the year began, the council had acted, and every teacher then or previously designated was informed of the proposition of the board.

As said by the trial court, every teacher acquiesced in the plan, and that is the end of the case, unless certain provisions found in chapter 36, *supra*, are unconstitutional, as urged by counsel, and this fact will permit plaintiff to recover. It is counsel's position on this point that the provisions in the chapter which take away from the governing body of the school district the right to determine the amount of its own expenditures, and vest that power in the city council, which has no other power in the whole management of the district, are invalid, because, as to such provisions, the subject of the legislative act, now chapter 36, was not expressed in its title, as required by Const. art. 4, § 27, and, in fact, that the title is really deceptive and misleading. Just where this would leave counsel and his client, if we should agree with him, we are not prepared to say, but we are of the opinion that there is nothing in the claim.

In substance, the act was entitled an act to abolish the board of education of the city, to repeal certain laws concerning said board, providing that the city shall constitute a single and independent school district, and as such exercise all of the powers heretofore vested in the board of education. The constitutional provision (article 4, § 27) is to have a practical and liberal construction, for it is manifest that a law may embrace but one subject, and yet include many provisions and details, which would be inconvenient and unnecessary to refer to in the title. It is sufficient if the title fairly and reasonably expresses the subject, or is sufficiently broad and comprehensive to include the several provisions relating to, or connected with, the subject. And whatever provisions of the law are germane to the title of the act are proper to be incorporated into the body thereof. A single and independent school district is created, according to this title, a previously existing board of education wiped out, and its powers vested in the new creation. In an act with such a title, we should expect to find the details of the management, and to find named the agencies or channels through which the new district might act. If it be germane to the subject

of creating a school district to authorize it to raise money for school purposes, we should expect to find the method provided for and the amount to be raised specified. These details, such as naming the agencies through which the newly-created body shall act, granting authority to raise money by taxation, stating how the necessary amount shall be determined, and other matters, are not required to be set forth in the title of the legislative enactment.

Judgment affirmed.

CANTY, J.

I concur in the result. By section 3 of the act, it was the duty of the board, after the appropriation by the city council, to fix definitely the compensation for each class of teachers, to be paid "for the ensuing year," which compensation "shall be paid monthly." This was not done, but a resolution was passed by which the board resolved to fix such compensation after the school year closed, and in the meantime the teachers were paid a certain definite salary for each month except the last. This method of procedure was wholly irregular. If the fact that the board had, each month except the last, ordered a certain fixed sum to be paid as monthly compensation, could be taken alone, it might amount to a fixing of the compensation for the whole year at the same monthly rate. But this fact cannot be taken alone. The board passed this irregular and illegal resolution, and the teachers acquiesced in it. The board had power to fix legally the salary for the year, and might have done so if the teachers had not acquiesced in the illegal resolution. Under these circumstances, the teachers are estopped to take advantage of the irregular and illegal way in which the salaries were fixed. See *Bowe v. City of St. Paul*, 70 Minn. 341, 345, 73 N. W. 184, and the case there cited.

CHARLES M. HANSON and Another v. ENOS WHITE and Others.

February 2, 1899.

Nos. 11,454—(212).

Insolvency—Fraudulent Preference—Findings not Sustained by Evidence.

Action to set aside a mortgage as a preference under the insolvency laws of the state. *Held*, that the evidence does not sustain the finding of the trial court to the effect that the mortgagee was a creditor of the mortgagor, and that the mortgage was taken to secure a pre-existing debt.

Action in the district court for Hennepin county by the assignees in insolvency of Austin F. Kelley and Louis E. Kelley, copartners under the firm name of A. F. & L. E. Kelley and as individuals, to set aside as a preference a mortgage executed by Austin F. Kelley and wife to defendant White and by him assigned to defendant Evans. The cause was tried before Elliott, J., who found in favor of plaintiffs. From an order denying a motion for a new trial, defendants appealed. Reversed.

Young & Waite, for appellants.

To constitute a cause of action under G. S. 1894, § 4243, the relation of debtor and creditor must have existed, the mortgage must have been given with the intention of giving a preference to a creditor, and the mortgagee must have had reasonable cause to believe the mortgagor insolvent. *Baumann v. Cunningham*, 48 Minn. 292; *Fisher v. Utendorfer*, 68 Minn. 226. Here there was no pre-existing debt. The firm did not assume to make a collection of the mortgage debt as agent of White. See *Herrick v. Mosher*, 71 Minn. 270. Any disability applicable to A. F. Kelley applied to the firm. *Deakin v. Underwood*, 37 Minn. 98, 101. One cannot be a party and the agent for the opposite party in the same transaction. *Mechem*, Ag. § 68; *Story*, Ag. §§ 210, 211; *Rhodes v. Webb*, 24 Minn. 292; *Fellows v. Northrup*, 39 N. Y. 117, 122; *Bank v. American*, 143 N. Y. 559, 564. White's right to repudiate the purported collection on discovery of the facts is not dependent on

showing actual damage. *Tilleny v. Wolverton*, 46 Minn. 256; *Friesenhahn v. Bushnell*, 47 Minn. 443; *Lum v. McEwen*, 56 Minn. 278, 282; *Donnelly v. Cunningham*, 58 Minn. 376; *Conkey v. Bond*, 36 N. Y. 427; *Porter v. Woodruff*, 36 N. J. Eq. 174. There was no ratification. Ratification must have been with knowledge of the facts. *Seymour v. Wyckoff*, 10 N. Y. 213; *Owings v. Hull*, 9 Pet. 607, 629; *Ladd v. Hilderbrant*, 27 Wis. 135, 144; *Smith v. Kidd*, 68 N. Y. 130. No ratification is to be implied from White's failure to satisfy the mortgage. *Humphrey v. Havens*, 12 Minn. 196 (298); *Bryant v. Moore*, 26 Me. 84; *Martin v. Hickman*, 64 Ark. 217; *Clark v. Clark*, 59 Mo. App. 532, 535. The acts set up as a collection not having been performed under any pretense of agency, cannot be turned into a collection by ratification. *Mitchell v. Minnesota Fire Assn.*, 48 Minn. 278; *Hammerslough v. Cheatham*, 84 Mo. 13; *Herd v. Bank*, 66 Mo. App. 643; *Crowder v. Reed*, 80 Ind. 1; *Condit v. Baldwin*, 21 N. Y. 219, 225. The Thayer mortgage is still a valid lien. White having chosen the Kelley mortgage, if the court permits him so to elect, he surrenders the Thayer mortgage, not by way of ratification of any pretended collection, but by acceptance of a substituted security. Even if this would be in fraud of creditors, no advantage of the fact could be taken in this action. *Cragin v. Carmichael*, 2 Dill. 519.

If the alleged indebtedness is not shown, it follows that the alleged intent is not shown. See *Ex parte Taylor*, L. R. 18 Q. B. D. 295; *Ex parte Caldecott*, L. R. 4 Ch. D. 150, 156. If the funds paid by the Derbys to Kelley could be traced into the hands of the assignee, they would be impressed with a constructive trust in favor of the Derbys for payment of the Thayer mortgage. *Herrick v. Mosher*, *supra*. But if A. F. Kelley, with the purpose of executing what he conceived to be a trust, had given the mortgage in question to pay the Thayer mortgage, the transaction would not have been a fraudulent preference. *Ex parte Stubbins*, L. R. 17 Ch. D. 58; *In re Frantzen*, 20 Fed. 785.

Cobb & Wheelwright, for respondents.

START, C. J.

On July 14, 1896, Austin F. Kelley and wife executed to the de-

fendant Enos White a real-estate mortgage, on land then owned by Kelley, to secure the payment of a promissory note of \$1,000, made as a part of the same transaction by Kelley to White. Kelley was insolvent at this time, and on September 12 following made an assignment in insolvency for the benefit of his creditors to the plaintiffs, who brought this action to set aside the mortgage as a preference. The trial court found that, at the time the mortgage was made, the firm of A. F. & L. E. Kelley was indebted to White on open account, then long past due and unpaid, in the sum of \$1,000, and that White was then the creditor of the Kelleys, who were then, as a firm and individually, insolvent, to his knowledge, and that the mortgage was made and received with the intent to prefer White as such creditor. As a conclusion of law the court directed judgment to be entered for the plaintiffs, setting aside the mortgage as a preference. The defendants appealed from an order denying their motion for a new trial.

The appellants make 24 assignments of error, which challenge the correctness of the trial court's findings of fact and conclusions of law. We may cut the whole matter short by stating that, if White was a creditor of Kelley at the time the mortgage was made, the findings of fact and conclusions of law are sustained by the evidence. The validity of the mortgage is attacked solely on the ground that it was a preference, within the meaning of the insolvency law. To render this mortgage a preference, the mortgagee must have been at the time a creditor of the mortgagor, and the mortgage given to secure a pre-existing debt. If, in fact, there was neither a creditor nor a debt to be secured, there could be, in law, no preference of a creditor by giving the security. This case, then, comes down to this question: Does the evidence sustain the finding of fact that White was a creditor of Kelley, and that the mortgage was given to secure a pre-existing debt? There was practically no conflict in the evidence, which tended to establish the following facts:

On July 1, 1886, E. A. Thayer executed a mortgage on his land in Dodge county to White to secure the payment of his note for \$1,000, and on August 16, 1886, he conveyed the land to A. F. Kelley, who assumed and agreed to pay the mortgage. June 30, 1893, White

sent the Thayer note (retaining the mortgage) to the Kelleys for collection and reloan. From this date until the spring of 1896 the Kelleys represented to White that they were trying to collect the principal of the Thayer loan, but were unable to do so. They sent to him from time to time the interest on the loan. August 28, 1895, there was recorded in the office of the register of deeds of the county of Dodge a forged release of the Thayer mortgage, purporting to have been executed by White, and acknowledged before A. F. Kelley as a notary public, who at or about the same time conveyed the mortgaged premises as unincumbered, by warranty deed, to Daniel and Martin Derby, who paid to Kelley in cash \$2,500, the full purchase price thereof, which sum he deposited in bank to the credit of A. F. & L. E. Kelley. The respondent claims that Kelley agreed with the Derbys to pay the Thayer mortgage, but the cross-examination of Kelley shows that there was no such agreement. Some six months after this last transaction there was credited to White in the account books of the Kelleys, by direction of A. F. Kelley, \$1,000, on account of the Thayer mortgage. In the spring of 1896 White employed C. H. Smith to look after his business with the Kelleys, and about July 1, 1896, Smith was informed by A. F. Kelley that the Thayer mortgage had been paid to him, and Smith so advised White. Thereupon, and on July 14, 1896, the mortgage in question was taken from Kelley to secure the payment of the \$1,000, which both White and his agent had been informed, and then believed, had been paid to the Kelleys by the collection of the Thayer mortgage.

If such had been the actual fact, the conclusion would necessarily follow that White was a creditor of the Kelleys, and that the mortgage was given to secure a pre-existing debt. The Thayer mortgage, however, was never collected or paid as to White. Kelley had obligated himself to pay this mortgage, and the fact that he entered a credit to White on his books for the amount due on the mortgage cannot be regarded as either a collection or payment thereof. See *Herrick v. Mosher*, 71 Minn. 270, 73 N. W. 964. Therefore, White was not, in fact, a creditor of the Kelleys, and his mortgage was not taken, at the time it was executed, to secure a pre-existing debt.

Neither White nor his agent, Smith, had any knowledge whatever of the actual facts as to the Thayer mortgage until October, 1897. He has not, since he learned such facts, tendered a surrender of the mortgage in question, or sought to rescind the transaction. Whether, upon the discovery of the actual facts, he could have surrendered the Kelley mortgage, and enforced the Thayer mortgage against Derby's land, is a question we have no occasion to discuss; for he elected to retain the Kelley mortgage after learning all of the facts in regard to the supposed payment of the Thayer mortgage. He thereby ratified the Kelley mortgage, and the legal effect of the transaction is now precisely the same as, and not otherwise than, it would have been if he had known all of the facts at the time the mortgage was executed. If the mortgage had been taken with a full knowledge of all the facts, and with reference to them, it could not have been taken to secure a pre-existing debt, for there was none to secure. It would have been given, in legal effect, for a new consideration, which was the waiver by White of his lien on Derby's land, and his acceptance of the lien of the Kelley mortgage in lieu thereof, whereby Kelley's covenants in his deed to the Derbys were made good. Such being the legal effect of the transaction, it follows that the finding of the trial court that White was a creditor of Kelley at the time the mortgage was given, and that it was taken to secure a pre-existing debt, is not sustained by the evidence.

Order reversed, and a new trial granted.

JANE E. WOOD v. MARY M. BRAGG and Another.

February 2, 1899.

Nos. 11,468—(258).

Guaranty of Promissory Note—Owner—Action Maintainable.

Held, upon the facts stated in the opinion, that the plaintiff is the owner, and entitled to maintain this action upon the defendant's contract of guaranty of the payment, of a certain promissory note.

Statute of Limitations Suspended—Appointment of Executor or Administrator—G. S. 1894, §§ 5148, 5149.

G. S. 1894, §§ 5148, 5149, construed, and *held*, that the latter section prescribes the general rule that for six months after the appointment of an executor or administrator, plus the time elapsing between the death of the person entitled to bring an action and such appointment, not exceeding six months, the running of the statute of limitations is suspended, and that the former section applies only to special cases, where the person entitled to bring the action dies within the last year of the term of limitation.

Action in the district court for Ramsey county by the executrix of the last will of Enos Wood, deceased, upon a promissory note, the payment of which was guarantied by defendants. The cause was tried before O. B. Lewis, J., who found in favor of plaintiff. From an order denying a motion for a new trial, defendants appealed. Affirmed.

Walter L. Chapin, for appellants.

G. S. 1894, § 5148, applies to causes of action accruing during the life of decedent; and section 5149 applies only to causes of action accruing after the death of decedent. Section 5149 does not suspend the running of the general statute of limitation so as to extend the time. This section was originally part of another chapter, and its history shows that it was not intended to affect the limitations prescribed in chapter 66. The contract of guaranty never passed to Enos Wood or to plaintiff. The note was merged in the judgment, and its negotiability destroyed. 2 Daniel, Neg. Inst. § 1284; *Harlev v. Davis*, 16 Minn. 441 (487). A judgment, being matter of judicial record, can only be transferred by assignment. This court has gone no farther than to hold that the guaranty passes with the transfer of a negotiable instrument for which it is security. *Phelps v. Sargent*, 69 Minn. 118; *Harbord v. Cooper*, 43 Minn. 466. The note was nonnegotiable because merged, and the mortgage under Minnesota decisions was always so. *Watkins v. Goessler*, 65 Minn. 118. An assignment of the judgment would carry the mortgage security because the latter is incidental to the debt. *Hill v. Edwards*, 11 Minn. 5 (22); *Humphrey v. Buisson*, 19 Minn. 183 (221). But the converse of this is not true. The guar-

anties cannot be transferred without the principal debt, for they are collateral to and limited by it and its ownership. Notwithstanding the purchase of the notes with money of Enos Wood, Grace R. Knowles had the title, and was authorized to sue and did sue Boardman on the note. G. S. 1894, § 5158; *St. Anthony Mill Co. v. Vandall*, 1 Minn. 195 (246); *Minnesota Thresher Mnfg. Co. v. Heipler*, 49 Minn. 395. The maker could not be sued twice. The suit by the legal holder in 1892 fixed the ownership of the note in Grace R. Knowles, and precluded a suit by Enos Wood. The guaranties then remained with the note, and the latter with the judgment—in Grace R. Knowles.

M. P. Brewer, for respondent.

START, C. J.

May 19, 1888, W. B. Boardman duly made his promissory note for \$1,200 to the defendant Mary M. Bragg, payable, with interest, on or before three years from that date, and secured its payment by a real-estate mortgage duly executed to her. One-half of the principal of the note, and interest thereon to November 19, 1889, were paid October 2, 1890; and on that day the payee, Mary M. Bragg, for a valuable consideration to her paid by Enos Wood, sold, assigned and delivered the note and mortgage to Grace R. Knowles; and upon the same consideration, and as a part of the same transaction, Mary M. Bragg and her co-defendant Wallace F. Bragg each duly executed a written guaranty of the payment of the note upon the back thereof, which was delivered with the note and mortgage. Grace R. Knowles, in her own name, duly recovered judgment against the maker of the note, in the district court of the county of Hennepin, on April 12, 1892. She paid no part of the consideration for the note and mortgage, and had no beneficial interest therein, but held the same solely as the trustee of Enos Wood until March 5, 1895, when she executed to him an assignment of the note and mortgage and all of her rights therein. He died, testate, April 19, 1896; and on May 26, 1896, the plaintiff was duly appointed executrix of his will, and brought this action upon the guaranty, November 23, 1897. Thereafter, and before the trial of

the action, Grace R. Knowles duly assigned the judgment to the plaintiff.

The foregoing are the material facts found by the trial court. As a conclusion of law, the trial court upon the foregoing facts ordered judgment in favor of the plaintiff, and against the defendants, for \$600, and interest, upon delivery to the clerk of the court of due assignments to the defendants of the note, mortgage and judgment. The defendants appealed from an order denying their motion for a new trial.

There is no settled case or bill of exceptions in the record, and the question here is whether the findings of fact justify the conclusion of law of the trial court. The appellants' contention is that the trial court's conclusion is erroneous, for two reasons: First, the contract of guaranty never passed to Enos Wood or the plaintiff; second, the statute of limitations had run before this action was brought.

1. The contract of guaranty in this case was not limited to any particular person. It was a general guaranty of the payment of the note; that is, of the debt of which the note was the evidence. Grace R. Knowles held the naked legal title to the debt and securities, including the contract of guaranty, in trust for Wood, who was at all times the actual and beneficial owner thereof, and entitled, by virtue of the statute, to bring an action thereon in his own name, as the real party in interest. He was also the actual owner of the judgment recovered against the maker of the note in the name of Grace R. Knowles. The promise of the maker of the note was merged in the judgment, which was only another form of the original debt, but this did not affect the contract of guaranty, or the makers thereof. The legal title to the debt guaranteed, and with it the contract of guaranty, passed to Wood by the assignment of the note and mortgage; for there could be no effectual assignment of the mortgage that did not pass the debt it was given to secure. So, the finding of the trial court that the mortgage and note were assigned to Wood, with all the rights of the assignor therein, necessarily includes an assignment of the debt, which carried with it the contract of guaranty. *Foster v. Johnson*, 39 Minn. 378, 40 N. W. 255; *Craig v. Parkis*, 40 N. Y. 181; *Peters v. James*

town, 5 Cal. 334. It follows that both the legal and beneficial ownership of the contract of guaranty was in Wood at the date of his death, and that the plaintiff is entitled to maintain this action.

2. Whether this action is barred by the statute of limitations depends upon the construction to be given to G. S. 1894, §§ 5148, 5149. The first section, so far as here material, is in these words:

"If a person entitled to bring an action dies before the expiration of the time limited for the commencement thereof, and the cause of action survives, an action may be commenced by his personal representatives after the expiration of that time and within one year from his death."

The second one is as follows:

"The time which elapses between the death of a person and the granting of letters testamentary and of administration on his estate, not exceeding six months, and the period of six months after the granting of such letters, are not to be deemed any part of the time limited for the commencement of actions by executors or administrators."

The original of section 5148 is R. S. 1851, c. 70, § 18, and the original of section 5149 is R. S. 1851, c. 78, § 6. The contrary was inadvertently assumed in the case of *St. Paul Trust Co. v. Sargent*, 44 Minn. 449, 47 N. W. 51. They were brought together in the revision of 1866, as sections 18 and 19 of chapter 66. The order in which they were arranged was not logical, for section 19 states a general rule, and section 18 is practically a proviso thereto, making provision for special cases. When the sections are so read, and in their logical order, their meaning is clear, and there is no inconsistency in their provisions. Section 19 means just what it says, and declares the general rule to be that for six months after the appointment of an executor or administrator, plus the time elapsing between the death of the person entitled to bring an action and such appointment, not exceeding six months, the running of the statute of limitations is suspended. This general rule was enacted in view of the fact that the death of the party entitled to bring the action left no one to prosecute it, and that, after the appointment of an executor or administrator, some time must necessarily elapse to enable him to ascertain the condition of the estate, and

institute the action; hence the statute treats death as a disability, which arrests the running of the statute for the time stated therein.

This general rule, however, if applied to cases where the party entitled to bring the action died within the last year of the term of limitation, would leave less than a year after his death for the appointment of a personal representative and the bringing of the action; for example, if the delay in the appointment was one month, the action would have to be instituted within seven months after the death of the party. But it is evident from a reading of the sections in question that it was the judgment of the legislature that at least one year after the death of the party ought to be allowed for the appointment of a personal representative and the commencement of an action; hence section 18 was enacted, to provide for special cases, where the death of the party might occur in the last year of the term of limitation. This section 18 applies to, and only to, those cases where the person entitled to bring the action dies within the last year of the term of limitation. *Curran v. Witter*, 68 Wis. 16, 31 N. W. 705. This case falls within the general rule prescribed by section 19. Therefore the statute had not run when this action was commenced, November 23, 1897. It would have been barred May 22, 1897, except for the death of plaintiff's testator, which suspended the running of the statute for seven months and seven days.

The appellant further urges that this action was barred as to the trustee; hence it was, as to the plaintiff, within the rule that an action by a cestui que trust is barred when the trustee is barred. But the action was not barred as to the trustee in this case when the legal title vested in the plaintiff's testator.

Order affirmed.

JOHN C. JOHNSON and Another v. ROBERT G. DUN and Others.

February 2, 1899.

Nos. 11,475—(215).

Principal and Agent—Conversion of Bond to Release Attachment by Attorney of Mercantile Agency—Measure of Damages.

The plaintiffs delivered to the defendants certain notes for collection. The latter sent them to their attorney in the state of Connecticut, who there brought suit on them and attached the property of the maker. The attachment was voluntarily released in consideration of a bond to pay any judgment that might be finally recovered. The statute of that state provides that an attachment may be released by the court, on application and giving a bond to pay the judgment, not exceeding the value of the property attached. The plaintiffs recovered judgment on the notes, but declined to pay the attorney's fees until the judgment was collected. Thereupon the attorney settled the judgment, and surrendered the bond, as satisfied, to the obligors. *Held*, that the act of the attorney was a conversion of the bond, for which the defendants were liable; and, further, that the bond cannot be construed as a statutory bond for the dissolution of the attachment, but that it is a common-law bond for the payment of the judgment, and the measure of damages in this action for a conversion of the bond is *prima facie* the amount of the judgment which it secured.

Action for conversion in the district court for Hennepin county. The cause was tried before Simpson, J., and a jury, which rendered a verdict in favor of plaintiffs for \$8,297.65. From an order denying a motion for a new trial, defendants appealed. Affirmed.

William W. Bartlett, W. E. Hale and W. W. Macfarland, for appellants.

Defendants, being innocent of wrong, are liable only for plaintiffs' pecuniary loss immediately resulting from the wrongful acts of the subagent. *Hoover v. Wise*, 91 U. S. 308, 311; *Allen v. Merchants*, 22 Wend. 215, 34 Am. Dec. 289, and cases cited in note; *Borup v. Nininger*, 5 Minn. 417 (523); *First National v. Fourth National*, 77 N. Y. 320; *Story*, Ag. §§ 217–221. Plaintiffs have not shown a right to damages, for Burr's wrongful acts deprived them

of no legal rights. They sustain the same relations to Burr and to the obligors in the bond that existed before his futile act. *Beers v. Hendrickson*, 45 N. Y. 665. It was error not to permit defendants to show the value of the interest attached. Even Burr, as defendant in trover, would have had the right to show this. *Daggett v. Davis*, 53 Mich. 35. All that plaintiffs could recover, on any theory, would be the actual pecuniary value of the bond, less the amount of Burr's liens. There is nothing in the statute authorizing the condition found in the bond for absolute payment of the judgment, and the bond, having been taken as a condition for releasing the attachment, must be presumed to be, and to have been intended to be, the form of bond required by the statute. See *Tomlin v. Green*, 39 Ill. 225; *Hall v. Cushing*, 9 Pick. 395, 403; *Post v. Doremus*, 60 N. Y. 371; *Heynemann v. Eder*, 17 Cal. 434; *Bolton v. Robinson*, 13 Serg. & R. 193; *Couchman v. Lisle* (Ky.) 33 S. W. 940; *Morgan v. Menzies*, 60 Cal. 341; *Perry v. Post*, 45 Conn. 354; *Billings v. Avery*, 7 Conn. 235; *Fowler v. Bishop*, 32 Conn. 199; *Dayton v. Merritt*, 33 Conn. 184. The value of the bond was the value of the interest attached, and the burden was on plaintiffs to prove it. It is a debatable question whether the destruction of commercial obligations, as the result of negligence, involves the loss of the money they represent; but if a presumption in favor of their face value exists, the contrary may be proved. *Allen v. Suydam*, 20 Wend. 321. See also *Allen v. Merchants*, *supra*.

W. A. McDowell, for respondents.

A collection agency receiving a claim for collection, in the absence of a stipulation to the contrary, is liable for the negligence and bad faith of its correspondent. *Streissguth v. National G. A. Bank*, 43 Minn. 50; *Exchange Bank v. Third Nat. Bank*, 112 U. S. 276; *Simpson v. Waldby*, 63 Mich. 439; *Bradstreet v. Everson*, 72 Pa. St. 124; *Mechem, Ag.* § 515, et seq.; *Walker v. Stevens*, 79 Ill. 193; *Morgan v. Tener*, 83 Pa. St. 305. The court properly instructed the jury that, in determining the contract, they might take into consideration the previous course of dealing and all correspondence throwing light thereon. *First Nat. Bank v. Jagger*, 41 Minn. 308. The question as to the burden of proof is governed by *Greengard v.*

Fretz, 64 Minn. 10. But the burden of proof is not in issue. As soon as the conversion was proved plaintiffs made out a prima facie case. *Nininger v. Banning*, 7 Minn. 210 (274). The misconduct of defendants was such that the wrongful act of Burr was their act. Story, Ag. § 217a. The legal consequences flowing from an election of causes of action remain as at common law. At common law, in case of conversion, plaintiff might sue in case, replevin or trover, and subsequently he might sue for money had and received. 7 Enc. Pl. & Pr. 368. Recovery of judgment in trover, with satisfaction of judgment, vested title to the property converted in the wrong-doer, and many cases hold that mere recovery of judgment had the same effect. 6 Wait, Act. & Def. 224; *Cooley*, Torts, 537. Recovery of judgment in an action on the case for damages had no such effect, but the damages were treated as covering the detention. 6 Wait, Act. & Def. supra. The cases cited by defendants are cases of actions for negligence in which the title remained in plaintiff, even after recovery of judgment.

Burr's act amounted to a conversion. Had he been sued on the bond, he could not have claimed that the effect of his act was not to divest plaintiffs of title to the bond, nor can defendants so claim. *Syeds v. Hay*, 4 Term R. 260; 6 Wait, Act. & Def. 164; *M'Combie v. Davies*, 6 East, 538; *Kempker v. Boblyer*, 29 Iowa, 274; *Coopwood v. Baldwin*, 25 Miss. 129; *Pollard v. Rowland*, 2 Blackf. 22; *Webber v. Davis*, 44 Me. 147; *Davis v. Buffum*, 51 Me. 160; *Nelson v. King*, 25 Tex. 655; *Connor v. Hillier*, 11 Rich. 193; *Ayres v. French*, 41 Conn. 142; *Comparet v. Burr*, 5 Blackf. 419; *Stephenson v. Feezer*, 55 Ind. 416; *Donnell v. Thompson*, 13 Ala. 440; *Clowes v. Hawley*, 12 Johns. 483, 486; *Lewis v. Gamage*, 1 Pick. 346, 350.

The bond was not a statutory bond, but a common-law bond, and was binding according to its terms. 4 Am. & Eng. Enc. 671-673. A voluntary obligation on valid consideration is enforceable according to its terms, unless it is contrary to public policy or forbidden by statute; and where parties have received the benefit contracted for they cannot question its binding obligation on the happening of the contingency. *Abbott v. Williams*, 15 Colo. 512; *Slut-ter v. Kirkendall*, 100 Pa. St. 307; *Wright v. Keyes*, 103 Pa. St. 567;

Central v. Stewart, 133 Mass. 461; Palmer v. Vance, 13 Cal. 553; Smith v. Fargo, 57 Cal. 157; Gardner v. Donnelly, 86 Cal. 367; Bunneman v. Wagner, 16 Ore. 433; Staples v. Fillmore, 43 Conn. 510; Enscoe v. Dunn, 44 Conn. 93.

START, C. J.

On October 1, 1891, the firm of Dunham & Johnson, consisting of John Dunham and the plaintiff John C. Johnson, delivered to the defendants, R. G. Dun & Co., a mercantile agency, having a collection department, promissory notes, made by J. E. Boyd, of the aggregate face amount of \$5,150 for collection. The defendant sent the notes to Lyman S. Burr, an attorney at law at New Britain, Connecticut, who on September 26, 1892, commenced an action against Boyd in the state of Connecticut on the notes, "factorizing" Chisholm, Boyd & White, the company of which Boyd was a member. Thereupon the firm of Chisholm, Boyd & White executed to the plaintiffs in the action a bond in the sum of \$10,000, in consideration of which the attachment was released. The condition of the bond is in these words:

"The condition of the obligation is such that, whereas, by writ dated at New Britain, Connecticut, September 22nd, A. D. 1892, there was attempted to be attached goods, effects and estate of the said obligors, or of said Boyd, alleged to be concealed in the hands of the Yale Brick Company, a corporation doing business at Berlin, Connecticut, in a cause of action wherein said obligees are plaintiffs and said Boyd is defendant, returnable to the superior court for Hartford county, Connecticut, on the first Tuesday of October, 1892: Now, therefore, in consideration of the release of said attachment against said Yale Brick Company by said Dunham & Johnson, if said Chisholm, Boyd & White, said obligors, or either of them, shall pay the judgment that may be finally recovered against said Boyd in said suit, on execution issued, then this obligation shall be null and void; otherwise, of full force and virtue."

The result of the action against Boyd was a judgment in favor of the plaintiffs in the sum of \$7,221.04. The plaintiffs herein, John C. Johnson & Co., succeeded the firm of Dunham & Johnson, and own its assets. The fee charged by Burr for securing the judgment was \$1,500, which included \$500 for the fees of associate counsel. He wrote several letters to Dun & Co. and to the plaintiffs, asking pay for his services, but nothing was paid except \$200,

to apply on costs and disbursements; the plaintiffs refusing to pay anything further until the judgment was collected. Afterwards, and about August 10, 1894, Burr wrote Dun & Co. that he could sell the bond in question to the sureties for about \$5,000, payable in cash and notes, and that he proposed to do so in order to get money to pay his fees, to which Dun & Co. replied: "We trust that you will not do anything so rash as to sell this bond because Mr. Johnson has been dilatory in paying attorney's fees." He did, however, without the authority of either of the parties to this action, settle the judgment, and surrendered, as satisfied, the bond to one of the obligors thereof, in consideration of \$5,000, payable in promissory notes, one of which, for \$1,800, was payable to Burr, and the balance to R. G. Dun & Co., to whom Burr sent the notes payable to them, with a report of the transaction. The plaintiffs refused to accept this settlement, and brought this action against Dun & Co. to recover damages for the conversion of the bond. The plaintiffs had a verdict for \$8,297.65, and the defendants appealed from an order denying their motion for a new trial.

1. That the act of Burr in disposing of the bond was a conversion is too obvious to admit of reasonable controversy. "Any distinct act of dominion, wrongfully exerted over one's property, in denial of his right, or inconsistent with it, is a conversion." Cooley, Torts, 448. Whether the defendants were liable for the wrongful act of Burr was one of the issues at the trial, the determination of which depended on the contract between the plaintiffs and defendants as to the collection of the notes against Boyd. The plaintiffs claimed that the contract was a general and unlimited one to undertake the collection of the notes for them, while the defendants claimed that the contract was a limited one, whereby they were to transmit the notes for collection to an attorney, for whose acts or omissions they were not to be responsible, except for money actually collected by him and not paid over. The jury found for the plaintiffs on this issue, but the defendants here urge that the finding is not sustained by the evidence. We have examined the record, and find that the verdict in this respect is sustained by the evidence.

The defendants also assign as error the refusal of the trial court to give, as applicable to this issue, their requests Nos. 1 and 2.

They both refer to the effect to be given to the evidence relating to the previous course of business between the parties in determining what the contract was as to the collection of the particular notes in question. The requests occupy more than a page and a half of the paper book, and are so manifestly argumentative and misleading that it would have been error to give either of them. 11 Enc. Pl. & Pr. 142. The trial court, however, did instruct the jury that, in determining what the contract was, they might take into consideration the previous course of dealing between the parties, and all of their correspondence tending to throw any light thereon, and correctly submitted the issue to them. The defendants having accepted the notes for collection without any limitations of their liability, it follows that they are liable for the acts of their attorney, Burr. *Streissguth v. National G. A. Bank*, 43 Minn. 50, 44 N. W. 797.

2. This brings us to the consideration of the measure of the plaintiffs' damages. The defendants' claim is that, inasmuch as they are personally innocent of any wrong in the premises, the plaintiffs can only recover from them the actual pecuniary loss resulting directly from the act of their attorney, Burr; that he acted without authority, and hence the plaintiffs' right and title to the judgment, and the bond securing it, were unaffected by his act; that they may still enforce the judgment and reclaim the bond, and therefore the plaintiffs are entitled to only nominal damages.

If this were an action to recover damages sustained by reason of the fraud or negligence of the defendants' agent and attorney, and their own good faith was unquestioned, the damages would be limited to such actual loss as directly resulted from the fraud or negligence. A recovery in such an action would not affect the plaintiffs' title to the judgment or bond. The authorities cited and relied on by the defendants are such cases; hence they are not applicable to this action, which is not an action on the case for consequential damages sustained by the fraud of defendants' agent. It is, in its essence and legal consequences, an action of trover for the conversion of the bond. A recovery in such an action, and satisfaction of the judgment, vests the title to the property converted in the wrongdoer. *Cooley, Torts*, 537. The plaintiffs' remedy

was not limited to a contest with the obligors of the bond for its recovery and reinstatement as security for the payment of the judgment. They had a right to acquiesce in what had been done, and look to the parties through whose interference with their property the contest had been thrown upon them, and hold the parties for a conversion. *Hossfeldt v. Dill*, 28 Minn. 469, 10 N. W. 781; *Appleton Mill Co. v. Warder*, 42 Minn. 117, 43 N. W. 791. Assuming, then, that the bond secured the payment of the judgment absolutely, and not simply to the extent of the value of the property released in consideration of the bond, the measure of the plaintiffs' damages was *prima facie* the amount of the judgment which the bond secured. *Nininger v. Banning*, 7 Minn. 210 (274). If any facts existed, such as the insolvency of the obligors, which affected the value of the bond, the burden of establishing them rested upon the defendants.

The defendants further contend that the bond, although on its face importing an absolute undertaking to pay any judgment the plaintiffs might recover against Boyd, must be construed as conditioned to pay the judgment, not exceeding the value of the property attached, which is the condition of a statutory bond of Connecticut for the release of any attachment. This question was properly raised on the trial by offers of evidence and requests for instructions to the jury, which were refused by the trial court. If the bond was given as a statutory bond, pursuant to the provisions of the statute of Connecticut set forth in the answer herein, as the defendants claim, then their contention is correct. But if it is a voluntary common-law bond, given in consideration of the voluntary release of the attachment, it must be given effect according to its terms, and held to secure the payment of the judgment unconditionally.

Counsel for defendants assert that the complaint in effect alleges that the bond was a statutory one, because it pleads the statute of Connecticut authorizing the issuing of attachments, and alleges that the bond was given to procure a release of the attachment. This is not a proper or permissible construction of the complaint, for it contains no suggestion of any statutory provisions for the release of the attachment by the court, or the giving of a bond, or

that the bond was given pursuant to any statutory provisions. The answer sets out the provisions of the statute of Connecticut for the release of attachments, and alleges that the bond was null and void, for the reason that the same was not given in compliance with such statutory provisions, but contrary thereto. Conceding, however, that the answer, taken as a whole, may be construed as alleging that the bond was intended as a statutory bond to secure the release of the attachment, the reply put the matter in issue.

It must be conceded that, where a bond is executed in an attempted compliance with a statute authorizing it, but it contains conditions in excess of those required by the statute, it is void, at least as to such conditions, and that there can be no recovery on the bond, beyond the conditions prescribed by the statute. The cases cited by defendants support this proposition, but none of them controvert the equally well-settled proposition that a voluntary bond, other than an official bond, based upon a valid consideration, is enforceable as a common-law bond according to its conditions, although they are more onerous than would have been required if a statutory bond had been given to effect the same purpose. *Smith v. Fargo*, 57 Cal. 157; *Gardner v. Donnelly*, 86 Cal. 367, 24 Pac. 1072; *Central v. Stewart*, 133 Mass. 461; *Slutter v. Kirkendall*, 100 Pa. St. 307.

The case of *Perry v. Post*, 45 Conn. 354, cited by defendants' counsel, upon the statement of the case made in his brief, apparently supports his construction of the bond in question. But the bond in that case was given as a statutory bond, which stated the value of the property attached, as estimated, to be \$7,000, and was for that amount. It was conditioned for the payment of the judgment that might be recovered in the suit, not exceeding the amount of the bond. The sole question involved in the case was whether, in assessing the damages for a breach of the bond, the value of the property at the time the bond was given or at the time the judgment was rendered was to control. It was conceded that the bond was a statutory one, and a substitute for the property attached. The case is not in point upon the question whether the bond we are considering is a statutory or a common-law bond. This is also true in reference to the case of *Dunham v. Chisholm*, set out in full in

the brief of counsel (U. S. C. C. Northern District of Illinois, January, 1898), which was an action upon this identical bond. In that case the obligors on the bond, by one of their pleas, set forth the bond as a statutory bond of Connecticut, and averred that the value of the attached property did not exceed \$2,000. To this plea the plaintiffs demurred, which raised the question whether the measure of damages was the amount of the judgment or the value of the property attached, and it was held that the latter was the correct one. But the question whether the bond was a statutory or a common-law bond was not before the court, as the demurrer conceded that it was the former.

The question to which class this bond belongs is to be answered by a consideration of the statutory provisions, and what was done by the parties at the time the attachment was released. The only way provided by the statute of Connecticut for securing a dissolution of an attachment, by giving a bond, is by application to the judge of the court, giving to the plaintiff reasonable notice of the application, and an opportunity to be heard as to the value of the property and the sufficiency of the proposed bond, which must be in an amount equal to the value of the property attached, and conditioned to pay the judgment that may be recovered, or the value of the property attached, not exceeding the amount of the bond. The authority dissolving the attachment is required to certify his doings upon the application, and forthwith return it, with the bond and other proceedings, to the court to which the writ is returnable, where they must be kept on file. A compliance with these provisions of the statute involves delay and expense, but the plaintiffs waived them all, in consideration of the particular bond which was given.

The evidence shows that no application was made to the court, but that the whole matter was arranged by the attorneys of the respective parties. The attorneys met the next morning after the service of the process, and as a result of the meeting the bond was given and the attachment released. The whole matter was purely voluntary. The bond was delivered to Burr, and was retained by him until he delivered it to the obligors. The mere reading of the bond, in connection with the statute, shows that there was no

intention of complying with the statute, or to give a statutory bond. The plaintiffs in this case voluntarily consented to dissolve the attachment by which they sought to secure their debt upon receiving a bond to pay the debt in case they established it. Therefore the bond was given for a valid consideration, and not in consideration of the statutory provisions, and is not a statutory bond, but a common-law bond, enforceable according to its terms.

It follows, from this conclusion, that the trial court did not err in holding that the measure of the plaintiffs' damages for a conversion of the bond was the amount of the judgment recovered against Boyd, less the amount of reasonable attorney's fees for securing the judgment, or in refusing the evidence and requests tendered.

Order affirmed.

L. L. MANWARING v. JAMES S. O'BRIEN.

February 2, 1899.

Nos. 11,480—(247).

75	542
79	86
79	88
79	231

Replevin—Fraudulent Sale—Evidence.

Evidence in an action of claim and delivery brought by an assignee in insolvency to recover possession or the value of a stock of merchandise alleged to have been transferred by the insolvents to defendant, with intent to hinder, delay and defraud creditors, examined and considered. *Held* to have been ample to justify the trial court in its refusal to dismiss the case when plaintiff rested.

Evidence.

Certain objections to the reception of evidence produced by plaintiff disposed of.

Fraud—Facts Putting Vendee upon Inquiry.

In a case of this character, it is not necessary for a plaintiff to prove that the vendee actually participated in, or had actual notice of, the vendor's fraud. When the vendee has knowledge of such facts as would lead the ordinarily prudent man, using ordinary caution, to make inquiries, whereby the fraudulent intent would have been discovered, he cannot be deemed a bona fide purchaser.

Same—Charge of Court.

The charge of the court considered, and *held* to have been sufficiently certain and definite on the point last above noted.

Appeal by defendant from an order of the district court for Washington county, Crosby, J., denying a motion for a new trial. Affirmed.

J. N. Castle, for appellant.

Manwaring & Sullivan and *McLaughlin & Boyesen*, for respondent.

COLLINS, J.

Action in claim and delivery, brought by plaintiff, as an assignee in insolvency, to recover possession or the value of a stock of merchandise, consisting principally of boots and shoes, and store fixtures and furniture, of an alleged value of \$20,000. The proceeding does not seem to have been instituted under the provisions of G. S. 1894, § 4243, for the allegations in the complaint are that the insolvents, prior to the assignment, had pretended to sell and had transferred the property in question to defendant, with intent to hinder, delay and defraud their creditors, of which intent defendant had knowledge. The defendant answered, putting in issue these allegations. Subsequently, but prior to the trial, counsel for plaintiff moved for, and obtained, leave to file an amended complaint, in which it was alleged that the property had been fraudulently transferred and delivered to defendant, prior to such assignment, with the intent set forth in the original complaint. The cause was tried before a jury, and resulted in a verdict for plaintiff.

On appeal from an order denying defendant's motion for a new trial, counsel assigns error of the court below in allowing the amendment to the complaint, in overruling objections made by counsel to the introduction of certain testimony on behalf of the plaintiff, in refusing to dismiss, when plaintiff rested, upon the ground of insufficiency of the evidence, and also in portions of the charge, which portions were duly excepted to.

1. The ruling of the court on the motion to amend the complaint is not now reviewable. The remedy, if any, is by appeal from the judgment. *Minneapolis, St. P. & S. S. M. Ry. Co. v. Home Ins. Co.*, 64 Minn. 61, 66 N. W. 132, and cases cited.

2. The trial court did not err when it permitted the witnesses to testify as to the business interests, connections and transactions of one of these insolvents, at and just before the time of the alleged fraudulent transfer to defendant. From the evidence it appeared that this member of the insolvent firm was also engaged in other business, mercantile in character, with other parties, generally relatives. About the time of this affair, he entered into a number of suspicious transactions, whereby, if he is to be believed, he unloaded about all of his property on to other relatives, who paid him largely in cash therefor. These transactions were so closely connected, in point of time and in their nature, with the one herein involved, that testimony concerning the same bore upon the question of this particular insolvent's intent—and he seems to have been the principal man in the matter—when putting the goods in question into defendant's possession, and was admissible for that purpose, as held by the trial court. Great latitude should be allowed in the examination of the immediate parties to an alleged fraudulent transaction. *Cohen v. Goldberg*, 65 Minn. 473, 67 N. W. 1149.

3. Counsel for defendant insists that, where plaintiff rested, there was not a scintilla of evidence tending to show that the alleged sale and transfer of the goods in question to defendant was not in good faith, for an adequate cash payment then paid, and wholly free from circumstances which would even warrant the slightest suspicion of a fraudulent design on his client's part. We cannot agree with counsel as to the insufficiency of the evidence, although it is true that defendant, when testifying, denied all knowledge of the insolvents' financial condition, or of circumstances which would in any degree warn him of their fraudulent purpose.

Briefly stated, the facts were: That defendant was, and for years had been, a lumberman. The members of the insolvent firm had hastily disposed of a large part of their property, and were disposing of the balance, except the goods in dispute, principally to relatives. Their stock of boots and shoes was valued at about \$6,000 a month before the transfer to defendant, and had then suddenly increased, goods in store and in transit, to nearly \$20,000 in value; and their indebtedness had jumped from nothing to nearly \$14,000. One of the firm, Kilty, had spoken to defendant about buy-

ing him out, a week previously. About seven o'clock in the evening, defendant walked into the store, was shown the invoices, and examined the goods, nearly all in boxes which were not opened, for a space of time not exceeding 30 minutes. No one was present but Kilty and McLaughlin, the two insolvents, and defendant. Kilty asked \$13,000 for the entire stock, with furniture and fixtures. Defendant insisted that he had no right to buy certain goods, then at the depot, of the supposed value of \$500. Defendant then offered \$12,500 for the goods on hand, and this offer was accepted, within one hour after negotiations were commenced. At half past nine in the evening, Kilty and defendant went to an attorney's office, found him in, and there a bill of sale was prepared and executed, by which all of the goods, including those at the depot, and the store fixtures and furniture, were transferred to defendant.

According to Kilty's testimony, defendant then paid for the property, by giving his check on a bank for \$12,500, on which the former obtained the money next day. The defendant failed to testify as to the check, and no such paper was produced in evidence. Nor did defendant testify when or how he paid \$12,500 for a stock of goods, largely new and fresh, valued at \$20,000, exclusive of the fixtures and furniture, also included in the bill of sale. The following morning, the store was opened, with one of the insolvents in charge, as defendant's manager. No account of stock was taken and no invoices made at the time of the sale, nor was this done subsequently. Defendant did not take the trouble to examine either goods or invoices, except while he was in the store the evening he purchased, as stated. Buying largely, and, as he testified, expecting that he had made a good trade, he seems to have been content when the bill of sale was delivered; for after this he did nothing which indicated any interest in his purchase, or any anxiety to discover whether his stock of goods was worth more or less than the sum paid.

Comment upon a transaction of this character, and how the surrounding circumstances would impress the ordinary man, is unnecessary. Fraud is rarely susceptible of direct proof, and may be presumed from circumstances. Nor, in a case of this kind, is it necessary to prove that an alleged party to the fraud, such as a ven-

dee, actually participated therein, or that he had actual notice of his vendor's fraudulent intent. Where the vendee has knowledge of such facts as would lead the ordinarily prudent man, using ordinary caution, to make inquiries, whereby the fraudulent intent would have been discovered, he cannot be deemed a bona fide purchaser of property. The evidence before the jury, when counsel moved to dismiss, was, at least, sufficient to justify a finding that defendant vendee had knowledge of facts which should have led him to make further inquiry, whereby he would have discovered the fraud being perpetrated by his vendors.

4. We now reach the assignments pertaining to the charge of the court, and assume counsel's exceptions to have been sufficiently definite.

The case of *Daniels v. Bank of Zumbrota*, 35 Minn. 351, 29 N. W. 165, cited by him, is not in point, because that was an action brought by a receiver in insolvency to set aside a preferential transfer of stock, under the provisions of section 4243, *supra*, a wholly different kind of proceeding, and the rules there laid down do not apply.

To constitute that good faith which will protect a vendee in a transaction of the nature of the one before us, there must be, not only an absence of actual knowledge of or participation in the vendor's fraud, but an absence of that which, in the law, amounts to notice. If the vendee has knowledge of such facts as would lead an ordinarily prudent man, using ordinary caution, to make further inquiries, which, if made, would have disclosed the vendor's fraudulent intent, he will be deemed to have notice of such intent. Now, the charge of the court was quite long, and some of the language used was not strictly accurate, but it could not have been misunderstood by the jury. Parts of it seem to have been taken from *Hopkins v. Langton*, 30 Wis. 379; and while it contained the statement that if it was found by the jury that defendant had no actual knowledge of the fraudulent intent, but did have knowledge of such facts and circumstances as were naturally calculated to awaken suspicion of it in the mind of an ordinary man, he was chargeable with notice, it is quite clear that the court meant a well-defined suspicion, or the kind of suspicion which would put the ordinary man

on inquiry, and cause him at least to endeavor to discover the truth, and that the jury so understood it. For the gist of this part of the charge, again and again repeated, was that if the defendant did not make such inquiries as a man of ordinary care and prudence would have made in the same situation, and he could have ascertained the existence of the vendor's fraudulent intent by making such inquiries, he was chargeable with knowledge of such intent. We are of the opinion that the charge on this point was sufficiently definite and certain, and was not misleading. Further assignments of error in regard to the charge need no special notice. None are well taken.

Order affirmed.

STATE ex rel. W. B. DOUGLAS, Attorney General, and Another v.
ARTHUR E. WILDER.

February 2, 1899.

Nos. 11,534—(269).

Election of Commissioners in Redistricted County—G. S. 1894, § 661.

Under the provisions of G. S. 1894, § 661, an entire new board of county commissioners must be elected at the first election held after a county is redistricted, and the number of its commissioner districts increased from three to five.

Writ of quo warranto issued from the supreme court requiring respondent to show by what warrant he held and exercised the office of county commissioner of Itasca county, and to show cause why he should not be adjudged to have usurped the office, and why William E. Meyers should not be declared to be entitled thereto. Writ of ouster ordered.

C. L. Pratt, for relator.

C. D. & Thos. D. O'Brien, for respondent.

COLLINS, J.

At its organization, Itasca county was divided into three commissioner districts, having a board of three members. In 1896 this respondent was elected from the second district; his term of office

commencing in January, 1897, and, according to his contention, continuing four years, as provided in G. S. 1894, § 661. In 1898, and long before the general election held in that year, the board re-districted the county into five commissioner districts (sections 657 and 662), the new district, numbered the second, still being the one in which respondent resided. He was a candidate for the office of commissioner of the second district at the 1898 election, but his opponent, Meyers, in whose behalf this proceeding has been instituted, was elected, receiving the certificate of election. Meyers was eligible to the office, and duly qualified, but the respondent refuses to surrender possession of the same, and persists in discharging the duties thereof.

Under the provisions of section 661, it is plain that at the first election held after five districts have been created—either at the original organization of the county, or by a redistricting, whereby the number of districts is increased from three to five—there must be elected an entire new board of county commissioners. The language used in section 661 precludes any other view of the matter, for it reads thus:

“At the first election, when the board of county commissioners will consist of five members, the persons elected from districts numbered one, three and five shall hold their offices for the term of two years, and the persons elected from the districts numbered two and four, for the term of four years, and thereafter the commissioners elected shall hold for the term of four years.”

It follows that the respondent is a usurper, and should be ousted. The construction of the statute here adopted is that placed upon it by Attorney General Cornell in 1871, by Attorney General Wilson in 1875, by Attorney General Start in 1880, and by Attorney General Hahn in 1881. See *Opinions Attys. Gen.* 262, 334, 439, 466. As was said in the opinion of the first-mentioned official,

“These provisions evidently contemplate the election of an entire new board at the first election next after the legal creation of five districts. The term of office of the members of the old board is subject to the power to redistrict, and, when such power is legally exercised, it necessarily affects the term of such office.”

See also *State v. Marr*, 65 Minn. 243, 68 N. W. 8, which is in ac-

cord with the views herein expressed. Counsel for respondent seem to think *Norwood v. Holden*, 45 Minn. 313, 47 N. W. 971, controls this case in their favor. In that case it was simply held that an order redistricting a county, made after a person has been elected commissioner from a certain numbered district, but before he is entitled to his seat in the board, and by which order the town in which such commissioner-elect resided was thrown into a district bearing another number, could not operate to disqualify him, or to deprive him of his right to the office. It is not in point here.

Let a writ of ouster issue, as demanded by the attorney general.

A. H. ESTY v. MARCELLA CUMMINGS.

February 21, 1899.

Nos. 11,423—(236).

75 549
80 517

Ejectment—Findings Sustained by Evidence.

Held, that the evidence in this case justifies the findings of the trial court.

Appeal by defendant from an order of the district court for St. Louis county, Cant, J., denying a motion for a new trial. Affirmed. *Potter & Marshall*, for appellant.

Francis W. Sullivan, for respondent.

BUCK, J.

Action in ejectment to recover possession of lot 3, East Third Street, Duluth Proper, First Division, in the city of Duluth, which plaintiff alleges is wrongfully withheld from him by the defendant, who is in the actual possession thereof.

The answer alleges that defendant's husband has been the owner of said lot for 16 years, that the same is, and during said 16 years has been, her homestead, that she has never released her right to such homestead, and that for many years she and her husband, with their children, have been living upon said lot as their homestead. The issues were tried by the court without a jury. The trial court found as facts that the plaintiff was, and since July 12, 1897, had

been, the owner of said lot, and that the defendant wrongfully withheld the same from plaintiff. The court also found that since July, 1880, the defendant and Alexander D. Cummings had been husband and wife; that four children were the fruit of said marriage; that defendant and her husband had been continuously in possession of said premises for the past 16 years, and that they, with their children, lived upon and occupied said lot; that during said last 16 years the defendant claimed, and still claims, said premises as her homestead, but that from about December 27, 1881, until October 8, 1894, the title to said premises was in the name of her husband, Alexander D. Cummings; and that he owned the same during such time. As a conclusion of law, the court held that the plaintiff was entitled to judgment for possession of said lot. Defendant appeals.

The findings of fact by the trial court are very brief, and we assume that they should be regarded as a finding of the ultimate facts, which necessarily include a finding of the evidentiary facts which the defendant requested the court to find; and to its refusal to so find, errors are assigned.

1. It is admitted that plaintiff has a good title, unless the evidence discloses a valid defense which defeats it. Hence the important question is, are the findings of fact by the trial court sustained by the evidence?

The plaintiff gave in evidence a warranty deed of the premises to one Hall, from Cummings and wife, dated August 2, 1894; a mortgage from Hall to plaintiff, dated September 1, 1894; and a certificate of sale on foreclosure of the mortgage to the plaintiff, dated July 10, 1896, from which there was no redemption; and the title therefore became absolute in plaintiff on July 10, 1897, unless the defendant sustained her defense.

The burden was upon her to overcome this record title. She attempted to do so in two ways: First, by the testimony of her husband, in which he testified in general terms that the deed to Hall was a mortgage, and that Hall was to pay off all prior incumbrances, and, when he was repaid this amount and the amount of his own claim, the lot was to be redeeded; that Hall was not to give a mortgage of \$5,000 to pay the prior incumbrances, but that he was to pay and discharge them, so that the title would be clear in Hall;

that he had paid Hall in full, and obtained a satisfaction of the claim, and a quitclaim deed of the premises. But the cross-examination of Cummings showed such a state of facts that the trial court evidently placed but little, if any, credence upon it, and we think that it was fully justified in disregarding it altogether. His pretended payment to Hall in nearly worthless mining stock, and the quitclaim deed obtained by him after the expiration of the period for redemption of plaintiff's mortgage, when Hall had no further interest therein, is but one of many instances where his conduct was of such a character that it evidently satisfied the trial court of its untruthfulness.

Some time in 1895 Hall commenced an action against Cummings and wife and Esty to foreclose, as an equitable mortgage, the deed of Cummings and wife, and the defeasance given back to them by Hall; and Alexander D. Cummings, in his verified answer in said action, alleged that he had agreed with Hall to convey to him, by good and sufficient deed, said premises, if Hall would procure a loan thereon, due in five years, and would pay off the prior incumbrances, and that pursuant to said agreement, and on the same day, the said Hall borrowed of the plaintiff herein, A. H. Esty, the sum of \$5,000, to be paid October 1, 1899, with interest thereon at the rate of 7 per cent. per annum, and that, to secure the payment thereof, Hall made, executed and delivered a mortgage to Esty on said lot, which mortgage was on October 9, 1894, duly recorded. Cummings knew that this sum of \$5,000 was to be obtained from Esty by Hall to pay off said prior incumbrances upon the property in controversy, and that Hall did in fact get the said sum of \$5,000 from Esty, and used the money so procured from Esty in getting assignments to himself of the two certificates which had been executed upon the mortgage foreclosures, and upon which there was never any redemption. Whatever right or title Hall had in the premises passed to Esty by virtue of Hall's mortgage to him and its foreclosure. After the expiration of the time for redemption, Cummings paid Esty rental for the use of the premises for several months at the rate of \$25 per month.

Notwithstanding these facts, defendant seeks to defeat plaintiff's rights by introducing in evidence a satisfaction and quitclaim deed

from Hall to Cummings of the former's interest and right in the premises, executed after Hall's right and title to the lot had passed to Esty, when Hall had not the slightest interest therein. It seems to be a scheme to cheat Esty out of money which he had loaned Hall to pay Cummings' own debts. Certainly the conduct of Cummings estops him from having any rights in the premises, and such conduct and the character of his testimony seem peculiarly within the province of the trial court in passing upon the weight of his evidence; and, if it disregarded it, as we think it did, there was no error in so doing. The former answer in the other case was admissible as cross-examination, and, conceding that it was error to admit the judgment roll in the former action, it was error without prejudice.

2. We now come to the other ground upon which defendant bases her defense, viz., that her husband is the owner of the lot in controversy, that it is a homestead, and that the deed thereof which she signed jointly with her husband to Hall was never delivered, and, hence, that it is void.

A brief examination of the evidence is necessary to reach a correct conclusion as to the rights of the wife. The mortgage from Hall to Esty was dated September 1, 1894, and recorded October 9, 1894. Prior to this time there were valid incumbrances upon the property, ranging somewhere from \$7,000 to \$10,000. The defendant, Mrs. Cummings, knew this to be so, and she and her husband were anxious to save their property from these liens; and, to this end, they executed the deed to Hall, and she left it with her husband to deliver to Hall, to the end that the latter should make a mortgage on the lot to Newport & Son, or some one, to obtain the money to pay off these prior liens or incumbrances. She testified that she executed the deed to Hall; that she knew it was to go to him, and the purpose for which it was executed and that such purpose was to procure a loan upon this property, through Newport & Son, or some one through them; that the amount was to be about \$6,500; that she desired the money for the purpose of paying off the mortgages on the place, and the taxes, and to clean up the incumbrances upon the property, and put it all in a new mortgage; and that the mortgages so to be paid off were those signed by her, which she knew to be existing liens upon the property. There was a failure to procure the

loan from Newport & Son, and she claims that she supposed that the whole matter was at an end, and that her husband had destroyed the deed. The deed in fact never was destroyed, nor does she so testify; nor does she testify that she ever told her husband to deliver it to Hall.

The gravamen of the matter which led to the execution of the deed and the agreement for taking back a contract was to raise money from some source to pay off the prior liens and incumbrances. She never executed any other deed or mortgage to any one to raise money to pay off the foreclosed mortgages and save her home, and she utterly failed to give any explanation as to how she expected to pay, or meet the payment of, these prior incumbrances, and she never did pay them. In delivering the deed to Hall, and taking back the contract, the husband carried out the original scheme, with the sole exception that the mortgage was made to Esty instead of to Newport & Son. But this did not injure the defendant. The first arrangement between defendant and her husband was to have Hall procure the money from some source to meet their prior obligations and save their incumbered property. The person or source from which the money was to be obtained was an immaterial matter, compared with the fact that Hall could get it at all. Hence the very fact that Hall did get it from Esty upon the arrangement made by the former with defendant and her husband practically and substantially carried out the agreement made by her, and accomplished the object she had in view and desired. The title to the lot was in the husband. She left the negotiations as to these monetary and financial matters to him. If he deceived her, that is a matter to be settled between themselves.

The vital question, however, is, shall both of them be permitted to disavow their own transactions, and cheat Esty out of his mortgage on the property which secured payment of the same? It is true that defendant or Esty must suffer by this transaction. Which, in equity and good conscience, shall it be,—Esty, who furnished \$5,000 to pay off debts of defendant and her husband, or defendant, who placed the power in the hands of her husband to get this money, by joining with him in the deed through which the money was secured, although she says that she did not authorize its

delivery to Hall? But she did authorize its delivery to Hall to get money of Newport & Son or some one else, and Hall got it of Esty, and paid the identical debts which he was authorized by her to pay if he had got the money of Newport & Son. If, after placing the actual as well as the apparent authority in the hands of her husband to procure money to pay off their joint indebtedness, and the money was thereby obtained and so used, she can repudiate the transactions, there will be but little safety for the business community in their financial dealings.

There is not the slightest tinge of fraud on the part of Esty. It is not claimed in the pleadings or evidence that there was any overreaching or misrepresentation upon his part. He was seeking an investment for his own money, not defendant's or her husband's property. Right to reasonable interest for use of money is not only a valuable but a lawful right,—as much so as rental for the use of land. The property does not appear to have been worth more than the claims against it, and these claims the defendant does not offer to pay. While the homestead right is a valuable one, and the protecting arm of the law should be carefully used in guarding it, it was never intended, and it should never be permitted, to operate as a vehicle for fraud and rank injustice. This would be the result, if Esty, after paying the debts of defendant and her husband, is compelled to lose this loan of \$5,000 and interest, or the lot which secured payment of the same, while they would hold the premises free from any lien, and their debts fully paid, without their paying anything to him. There is much force in the language used by the trial court in its memorandum attached to its finding of facts, and, as it is so brief, we state it, as follows:

“In view of the relations existing between the defendant and said Alexander D. Cummings, who had charge of the negotiations respecting the property in question, and in view of what has subsequently transpired, the defendant should not now be heard to assert the invalidity of the deed to Hall. It was entirely competent for the parties to agree that the conveyance to Hall should be for the purpose, primarily, of enabling him to give a valid first mortgage upon the property as security for a loan, and that, subject to such outstanding first mortgage, the title should be held in Hall as security for further indebtedness due to him. It is impossible to escape

the conclusion that this is substantially what was done. The deed was less than absolute only to the extent agreed upon by the parties. The mortgage was made as contemplated, and the money advanced by Esty. Defendant should then be precluded from questioning its validity. All other points raised and treated by defendant yield readily to the foregoing views, if they are correct."

We are of the opinion, therefore, that the evidence is insufficient to sustain the defense.

We have examined all errors assigned and points discussed, and our conclusion is that the order denying defendant's motion for a new trial should be affirmed. So ordered.

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